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In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

RONALD DALE DUNN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether a search warrant is needed to peer into the open side of a barn that is located in an open field.

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RONALD DALE DUNN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals on remand from this Court (App., *infra*, 1a-11a) is reported at 766 F.2d 880. The original opinion of the court of appeals (App., *infra*, 16a-35a) is reported at 674 F.2d 1093.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 36a) was entered on July 16, 1985. A petition for rehearing was denied on September 11, 1985 (App., *infra*, 14a-15a). On November 2, 1985, Justice White

extended the time for filing a petition for a writ of certiorari to and including December 10, 1985.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, respondent Dunn and his co-defendant, Robert Carpenter, were convicted on one count of conspiracy to manufacture phenylacetone and amphetamine, in violation of 21 U.S.C. 846 (Count One). Respondent also was convicted of manufacturing the two controlled substances (Counts Two and Three), and of possessing amphetamine with intent to distribute (Count Four), all in violation of 21 U.S.C. 841(a)(1) (App., *infra*, 16a-17a). Respondent was sentenced to consecutive terms of four years' imprisonment on each of the four counts, and three years' special parole on Counts Two through Four. He also was fined $10,000 on each count (10 R. 17-18). The court of appeals affirmed Carpenter's convictions but reversed those of

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[1] On October 3, 1985, the court of appeals entered an order recalling the mandate, thereby suspending its order of September 11 denying rehearing. On November 14, 1985, the court of appeals entered a new order denying the petition for rehearing en banc and reinstating its earlier order denying panel rehearing (App., *infra*, 12a-13a). Because the rehearing petition remained pending in the court of appeals (as the court of appeals noted in another case involving respondent, see *United States* v. *Dunn*, No. 84-1012 (Oct. 25, 1985)) and was not finally disposed of until November 14, the government's time to petition for certiorari appears to have begun to run anew on that date and does not expire until January 13, 1986. In order to eliminate any possible question of timeliness, however, this petition is being filed within the time limits dating from the original September 11 order.

respondent (App., *infra*, 16a-35a). On May 21, 1984, this Court granted the government's petition for a writ of certiorari (No. 82-508), vacated the judgment reversing respondent's convictions, and remanded for reconsideration in light of *Oliver* v. *United States*, No. 82-15 (Apr. 17, 1984). On remand, the court of appeals once again reversed respondent's convictions (App., *infra*, 1a-11a).

1. The evidence is detailed in the opinions of the court of appeals. In the summer of 1980, agents of the Drug Enforcement Administration (DEA) were conducting surveillance of Carpenter, who was accumulating large quantities of chemicals and equipment used in the manufacture of amphetamine and phenylacetone, substances controlled by federal law. The equipment included several hot plate stirrers, electric heating devices that apply heat to a container and magnetically stir the contents. Stirrers are used in the "cooking" of chemicals. App., *infra*, 17a-18a.

On September 3, 1980, DEA Agent Robert Surovec obtained a warrant from a Texas state judge authorizing the installation and operation of an electronic beeper in a stirrer. The beeper was installed and activated and, after Carpenter picked it up, the stirrer was tracked to his residence in Spring, Texas. The signal from this beeper was lost several days later. Meanwhile, warrants were obtained for the installation of beepers in a 55 gallon plastic drum of acetic anhydride and in a container of 100 pounds of phenylacetic acid, both ordered by Carpenter. Both beepers were installed, and the chemicals were delivered to Carpenter. The two beepers were monitored from October 27, 1980, until November 5, 1980, when, tracking the beeper in the 100 pound container, agents followed a pickup truck driven by Carpenter

from Houston to respondent's ranch near Johnson City, Texas. At that time, the signal from the hot plate stirrer beeper was detected again, also coming from the Dunn ranch. App., *infra*, 18a-19a.

DEA agents took aerial photographs of the ranch that afternoon. The photographs showed a ranch house at the end of a private driveway about one-half mile from a public road, a smaller house adjacent to the main residence, a windmill, a water tank, and two barns approximately 50 yards behind the house. The pickup truck was backed up to one of the barns. The entire ranch, about 198 acres in area, was encircled by a barbed wire perimeter fence, and there were several other "typical ranch type" (4 R. 90) interior fences, including one around the residence. The entrance to the private driveway was barred by a locked chain. App., *infra*, 3a, 19a; Exhs. 1-2.[2]

At about 9:00 p.m. on November 5, 1980, DEA Agent Ronald Gospodarek and Officer Martin Fite of the Houston Police Department entered the Dunn ranch by crossing the perimeter fence. They tried to make their way toward the barns behind the ranch house, but became disoriented in the dark. Eventually, they came to the driveway leading to the residence and from there they approached a fence at the rear of the ranch house. There Agent Gospodarek smelled a strong odor of phenylacetic acid, a precursor of phenylacetone. The officers crossed another fence and looked into an open pole barn, where they saw only empty boxes. Continuing to follow the odor they approached a second barn, where they heard the

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[2] "R." refers to the record in the court of appeals. "Exh." refers to the exhibits introduced by the government at the suppression hearing.

sound of a motor running. One end of the barn was open, but the entrance was blocked by a wooden, waist-high gate, which was closed and locked. Some type of netting hung from a tin overhang down to the gate. Standing outside the gate and shining their flashlights into the open side of the barn, the officers saw chemical equipment that appeared to be a phenylacetone laboratory (App., *infra*, 3a-4a, 19a-20a; 4 R. 73-82, 89, 93-94, 107-108; Exhs. 5-6).

Gospodarek and Fite then left the ranch, without crossing the fence around the ranch house, and reported their findings. An affidavit for a warrant to search the ranch was prepared, which included the information obtained from this entry onto the ranch, and the warrant was issued on the evening of November 6, 1980. The warrant was executed on the morning of November 8, at which time respondent was arrested, and the chemicals and equipment were seized. App., *infra*, 4a-5a, 22a; 4 R. 82-83.

2. The court of appeals reversed respondent's convictions, finding that the evidence seized pursuant to the search warrant should have been suppressed because the warrant was based on information obtained during an unlawful warrantless entry onto respondent's land (App., *infra*, 16a-35a).[3] The court rejected the contention that the search was lawful under the "open fields" doctrine; because both the ranch and the barn were surrounded by fences, the court held that the barn was "within the curtilage of the residence" (*id.* at 23a-29a). The court assumed that the government had probable cause to search the ranch,

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[3] Because Carpenter had no legitimate expectation of privacy in the ranch, his convictions were affirmed (App., *infra*, 23a, 35a).

but it held that a warrant was required for the entry and search (*id.* at 29a-33a).

3. This Court vacated the decision of the court of appeals and remanded for reconsideration in light of *Oliver* v. *United States*, No. 82-15 (April 17, 1984). No. 82-508 (May 21, 1984). On remand, the court of appeals determined that, in light of *Oliver*, it could no longer be maintained that the agents had entered onto the curtilage in crossing the outer fences of the ranch (App., *infra*, 5a-8a). It concluded that the barn "was not within the protected curtilage of the Dunn ranch house" (*id.* at 7a-8a). The court went on to state, however, that the barn was not an open field and "ought to be constitutionally protected from warrantless searches if the owner or occupier takes reasonable steps to effect privacy" (*id.* at 10a). The court found that respondent had taken steps to protect his privacy, noting the fences, the fact that one could see into the barn only from close range, and the fact that the barn was not open to entry (*ibid.*). Accordingly, the court concluded that respondent had a reasonable expectation of privacy in his barn and its contents, and therefore the officers' visual "search" of the barn from their exterior vantage point required a warrant (*ibid.*). The court again ordered that the evidence seized from respondent's barn be suppressed and his convictions reversed.

REASONS FOR GRANTING THE PETITION

In attempting to resurrect its original holding in this case after the basis for that holding was eliminated by this Court in *Oliver*, the court of appeals has reached a completely untenable result. The court has found that the police officers here infringed no constitutional rights in entering respondent's prop-

erty and approaching his barn as they followed the scent of the phenylacetic acid across the open fields. But when they have tracked that odor to its source and found it to be a barn exposed to view on one side, and although they have probable cause to believe that they would see an illegal narcotics laboratory if they just open their eyes, they must, according to the court of appeals, avert their eyes and depart to apply for a search warrant in order to look into the barn. The justification for this absurd result is an alleged expectation of privacy in the contents of the barn that rests on three shaky props: 1) the existence of a typical ranch fence surrounding the barn—which has already been held by this Court not to confer a legitimate expectation of privacy; 2) the fact that a gate bars entry to the barn—which is quite irrelevant since it has never been suggested that the officers entered or sought to enter the barn without a warrant; and 3) the fact that the contents of the barn would not have been visible to the officers had they been standing somewhere else—which can be said of almost anything situated in an open field and is also quite irrelevant. By its decision, the court of appeals has injected uncertainty into fundamental principles of Fourth Amendment law heretofore seemingly well settled. In addition (assuming no revision of general principles was intended), the court's circumvention on such a flimsy basis of this Court's decision vacating its earlier judgment should not be permitted to stand. See *Florida* v. *Rodriguez*, No. 83-1367 (Nov. 13, 1984).

To the extent the decision below rests on a legal principle not erased by *Oliver*, it seems to stand for the proposition that an area protected by the Fourth Amendment from warrantless entry is also protected

from warrantless visual inspection even if no entry is made. This proposition is completely inconsistent with the well-settled principle that a government official is not "precluded from observing as an officer what would be entirely visible to him as a private citizen." *Texas* v. *Brown*, 460 U.S. 730, 740 (1983) (plurality opinion). See also *Maryland* v. *Macon*, No. 84-778 (June 17, 1985), slip op. 5; *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 315 (1978); *Air Pollution Variance Board* v. *Western Alfalfa Corp.*, 416 U.S. 861, 865 (1974). Under *Oliver*, it is clear that the police were entitled to approach the barn just as a member of the public might reasonably have been expected to do. The court of appeals acknowledged this. Respondent had no reasonable expectation that a member of the public would not thereupon look into the open side of the barn, and the Fourth Amendment does not prevent a police officer from doing the same thing.

It is well established that the fact that the Fourth Amendment protects an area against warrantless *entry* does not mean that the Constitution erects a barrier to visual observation of that area from places open to the public. See, *e.g.*, *Oliver*, slip op. 7 n.9 (litigation focused on lawfulness of entry; no question that observation from outside the property was lawful); *Texas* v. *Brown*, *supra* (looking into an automobile); *United States* v. *Santana*, 427 U.S. 38 (1976) (observing individual in doorway of her home); *United States* v. *Lee*, 274 U.S. 559 (1927) (looking onto a boat deck).[4] Here, respondent could

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[4] Two cases pending before this Court, *Dow Chemical Co.* v. *United States*, No. 84-1259 (argued Dec. 10, 1985), and *California* v. *Ciraolo*, No. 84-1513 (argued Dec. 10, 1985), raise the question whether this principle extends to observa-

not claim a reasonable expectation of privacy in the interior of his barn, for he had quite clearly exposed it to public view by leaving one part of a side open and covering it with a non-opaque netting. The officers, by looking into the open barn from outside, did no more than observe what was already exposed to their view.[5]

The court of appeals acknowledged that the barn was not on the curtilage, but its decision seems to rest on the theory that the interior of the barn was imbued with an expectation of privacy akin to that of the curtilage. Even were that so, however, such an expectation of privacy is one of being free from entry, not observation. A long line of cases plainly demonstrates that the Court has always assumed that mere observation of the curtilage is lawful. In *Hester* v. *United States*, 265 U.S. 57 (1924), for exam-

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tion or photography from the air. An affirmance in *Dow Chemical* and reversal in *Ciraolo*, which we believe to be the appropriate results, would further confirm the untenability of the decision below. For this reason, the Court may wish to consider holding this case for *Dow Chemical* and *Ciraolo*. We emphasize, however, that the decision in this case is clearly wrong regardless of the ultimate disposition of *Dow Chemical* and *Ciraolo*. Whatever the rule for aerial observation, it cannot seriously be suggested that a police officer standing on his own two feet in a place to which the public has access requires a warrant in order to observe what is exposed to naked eye viewing.

[5] While the Court need not reach the question to decide the case, we note our position that a warrant is not required to make even an entry into a relatively non-private structure of the kind involved in this case. Even if the partially open barn is not deemed part of the open field, it supports only a limited expectation of privacy such that officers with probable cause do not act unreasonably in entering and searching such a structure.

ple, the police officers who entered the open field were able to observe the defendant in possession of contraband just outside the doorstep of his house. 265 U.S. at 58. Once the Court determined that the trespass did not violate the Fourth Amendment, it did not doubt that the officers lawfully could observe the defendant's activities from their vantage point in the open field, although those activities almost surely took place within the curtilage. Similarly, in *United States* v. *Karo*, No. 83-850 (July 3, 1984), and *United States* v. *Knotts*, 460 U.S. 276 (1983), the Court considered the Fourth Amendment implications of police monitoring of a "beeper" transmitting signals from in or near a privately owned building. The Court found manifestly unobjectionable the use of a beeper to obtain information available from visual surveillance, even if that surveillance extended up to the door of a residence (see *Karo*, slip op. 7-9; *Knotts*, 460 U.S. at 281-282, 285). The only Fourth Amendment problem arose from the use of the beeper "to obtain information that it could not have obtained by observation from outside the curtilage of the house" (*Karo*, slip op. 9). In sum, the fact that government officials may lack authority in a given situation to enter the curtilage of a residence does not prevent them from standing outside the curtilage and looking inside to observe what is exposed to their view from that vantage point. See also *Fullbright* v. *United States*, 392 F.2d 432, 434-435 (10th Cir.), cert. denied, 393 U.S. 830 (1968). By the same token, the officers in this case standing in respondent's open field were not constitutionally barred from looking inside a partially enclosed structure that was open to their view.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary disposition.

Respectfully submitted.

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DECEMBER 1985

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 81-1200

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

RONALD DALE DUNN, DEFENDANT-APPELLANT

July 16, 1985

Appeal from the United States District Court
for the Western District of Texas

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before WISDOM, POLITZ and TATE, Circuit Judges.

POLITZ, Circuit Judge:

Granting the government's petition for writ of certiorari, *United States v. Ronald Dale Dunn*, 466 U.S. ——, 104 S.Ct. 2380, 81 L.Ed.2d 340 (1984), the

Supreme Court vacated our disposition of Dunn's appeal, *United States v. Dunn*, 674 F.2d 1093 (5th Cir. 1982), and remanded "for further consideration in light of *Oliver v. United States*, 466 U.S. [——] [104 S.Ct. 1735, 80 L.Ed.2d 214] (1984)." Consistent therewith we have reconsidered our decision in light of the teachings of *Oliver* on the question of open fields and curtilage in fourth amendment analytical methodology. Upon reconsideration, we conclude that the barn in which Drug Enforcement Agent Ronald Gospodarek found the phenylacetone laboratory was not within the constitutionally protected curtilage of the ranch house. We have further concluded, however, that the agent's actions in crossing two fences alongside and around the barn, going under the front overhang of the barn to a position immediately adjacent to an inset wall and, with aid of a flashlight, peering through the barn's front fishnet covering to view its contents on November 5, 1980, violated the fourth amendment and tainted the subsequent seizures and inculpatory statements. Accordingly, we reverse the convictions of Dunn and remand for further proceedings. In doing so we reinstate a portion of the panel opinion as detailed herein.

Background Facts [1]

In the summer of 1980, Robert Lyle Carpenter, charged and convicted as a co-defendant with Dunn, began accumulating large quantities of chemicals and equipment typically used for the manufacture, *inter alia*, of phenylacetone, a controlled substance. DEA agents who had Carpenter under surveillance obtained

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[1] For additional factual data we refer to our earlier opinion, 674 F.2d 1093.

warrants for the installation of electronic beepers in purchases made by Carpenter, specifically an electric hot plate stirrer, a drum of acetic anhydride, and a container of phenylacetic acid. Guided by the beepers, DEA agents trailed Carpenter from Houston to Dunn's ranch near Johnson City, Texas during the morning of November 5, 1980. That afternoon, agent Gospodarek examined the ranch by air and took several aerial photographs.

The Dunn ranch contained 198 acres and was circled by a perimeter fence. The ranch house, outbuildings and improvements were one-half mile from a public road, connected by a private driveway blocked by a locked chain. The residence and other buildings were clustered in a small clearing not visible from either the public road or the perimeter fence. In addition to the exterior fence, there were several interior fences, most composed of multiple strands of barb wire.

The ranch house enclave contained the ranch house, a large garage/carport, a small greenhouse, two barns, a windmill and a stone water tank. There were several fences, including one around the ranch house and greenhouse, another around a side yard, one running from the ranch house to the large barn, and one traversing the front of the large barn. The large barn was approximately 50 yards behind the fence encircling the ranch house and the small barn was about thirty yards to its side separated by the windmill and the water tank.

The back and sides of the large barn were composed of brick, metal siding, and large metal sliding doors and were completely enclosed. The front of the barn was partially composed of a wooden wall with windows. The remainder was enclosed by waist-high wood slatting and wooden gates. At the time

of agent Gospodarek's visits on the night of November 5 and again the next day, the top half of the front of the barn was covered by a fishnet type material from the ceiling down to the top of the locked wooden gates. To see inside the barn it was necessary to stand immediately next to the netting. From as little as a few feet distant, visibility into the barn was obscured by the netting and slatting.

Around 9:00 p.m. on November 5, 1980, Gospodarek and officer Martin Fite of the Houston Police Department made surreptitious entry into the Dunn ranch. They crossed the perimeter fence and one other before reaching the clearing midway between the ranch house and barns. At that point Gospodarek smelled what he believed to be stored phenylacetic acid in solid state. The officers crossed one barb wire fence and looked into the smaller barn but saw only empty boxes. They crossed another barb wire fence, reached the closed side of the larger barn, walked around the back and sides but could not see inside. They retraced their steps and scaled a wooden fence at the front of the barn, entered under the overhang of the barn and walked to the locked front wooden gates topped by the netting material. After checking the house and determining that a flashlight could be used without the likelihood of discovery, Gospodarek shined his light through the openings in the netting, peered through and saw chemicals and equipment positioned in what appeared to be a manner typical of a crude phenylacetone laboratory. Gospodarek described the setting of the lab as being in a "closed-in area with walls on all sides except for the front where the waist-high gate and the fishnet was."

Principally based on agent Gospodarek's observations on the night of November 5, the DEA obtained a search warrant on November 6. The warrant was

executed on the morning of November 8 at which time Dunn was arrested and the chemicals, equipment, and a quantity of amphetamines were seized. In response to questions after his arrest Dunn admitted his culpability and directed the officers to a closet containing bags of the finished illicit product.

In our earlier opinion we concluded that the place from which agent Gospodarek viewed the contents of the barn was within the curtilage of the ranch house and thus was protected by the fourth amendment. Since the search was without a warrant we found it illegal, tainting the physical evidence found in the barn and house as well as the inculpatory statements made by Dunn after his arrest. We directed the suppression of all such evidence. It is this holding we have re-examined in light of the *Oliver* decision.

Analysis

In *Oliver* the Supreme Court reaffirmed its benchmark holding authored by Justice Holmes in *Hester v. United States*, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924), declaring that the fourth amendment extends to the home and its curtilage but does not extend to open fields. The Court defined curtilage as "the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life.'" 466 U.S. at ——, 104 S.Ct. at 1742, 80 L.Ed.2d at 225. In a footnote Justice Powell, writing for the majority added that "for most homes, the boundaries of the curtilage will be clearly marked; and the conception defining the curtilage—as the area around the home to which the activity of home life extends—is a familiar one easily understood from our daily experience." 466 U.S. at ——, 104 S.Ct. at 1743, 80 L.Ed.2d at 226 n. 12. Having given this direction, the Court declined to speak with specificity

about the extent or precise parameters of the curtilage and found it unnecessary "to consider the scope of the curtilage exception to the open fields doctrine or the degree of Fourth Amendment protection afforded the curtilage, as opposed to the home itself." 466 U.S. at ——, 104 S.Ct. at 1742, 80 L.Ed.2d at 225 n. 11. Referring with apparent approval to a decision by this circuit (*United States v. Williams*, 581 F.2d 451 (5th Cir.1978)), and those of two of our sister circuits, the Court concluded its guidance on the definitional process by noting that the courts of appeals considering the issue "have defined the curtilage, as did the common law, by reference to the factors that determine whether an individual reasonably may expect that an area immediately adjacent to the home will remain private." 466 U.S. at ——, 104 S.Ct. at 1742, 80 L.Ed.2d at 225.

The lessons of *Oliver* are clear as applied to a part of the instant inquiry. It is apparent that agent Gospodarek and officer Fite did not violate the fourth amendment by crossing the perimeter fence and any cross fences as they approached the ranch house enclave. It is also apparent that their continued progress toward the large barn was not proscribed by the Constitution so long as they remained in open fields, outside the curtilage. The effect of their circling the large barn, being unable to see inside through the back or sides, climbing a wooden fence at its front, entering its overhang and going into the immediate proximity of the fishnet and wooden gate front enclosure, is not so informed by *Oliver's* lead and nudge.

In this circuit's prior jurisprudence, essentially collected in *United States v. Williams* cited by the Supreme Court, as well as in decisions by our colleagues in other circuits, three factors seem to surface in the curtilage-quest: (1) the distance between

the place in question and the house; (2) whether the place is within a general enclosure that includes the house; and (3) the purpose or use of the questioned place. *See Care v. United States*, 231 F.2d 22 (10th Cir.1956).

The barn in the case *sub judice* was located approximately 50 yards beyond the fence which encircled the ranch house. In *Walker v. United States*, 225 F.2d 447 (5th Cir.1955), we held that the curtilage there included a barn 70 to 80 yards distant from the principal dwelling. Although relevant, distance alone is not dispositive of the question.

The second factor, commonality of enclosure, militates against Dunn's contention that the barn was in the curtilage. The ranch house and large barn were not within a common enclosure, they were separately enclosed. A substantial fence surrounded the ranch house, garage/carport and greenhouse, making those buildings an apparent unit. A lesser fence enclosed the front of the large barn, connecting to its sides. The open area between the ranch house and barn was partially fenced.

The third factor, purpose or use, weighs on the curtilage tray. A barn is a typical part of a farm or ranch and has been referred to as "a domestic building constituting an integral part of that group of structures making up the farm home." *Walker v. United States*, 225 F.2d at 449. *See also United States v. Williams; United States v. Tabor*, 722 F.2d 596 (10th Cir. 1983).

Weighing these factors under the illumination of *Oliver*, giving particular weight to the presence of the two separate fences plus a fenced-in open space between the large barn and the ranch house, we are persuaded, albeit not without substantial reservation, that the large barn was not within the protected

curtilage of the Dunn ranch house. This conclusion does not end our inquiry, however, because the fourth amendment applies to places other than just houses and their curtilages.

The holding of *Oliver* relates only to open fields. The Court declares "from the text of the Fourth Amendment and from the historical and contemporary understanding of its purposes, that an individual has no legitimate expectation that open fields will remain free from warrantless intrusion by government officers." 466 U.S. at ——, 104 S.Ct. at 1742, 80 L.Ed.2d 225-26. We must decide whether agent Gospodarek and officer Fite went beyond the permissible open fields and intruded into a constitutionally protected area when they approached and peered into the large barn.

In discussing the reach of open fields the *Oliver* Court observed:

> It is clear, however, that the term "open fields" may include any unoccupied or undeveloped area outside of the curtilage. As open field need be neither "open" nor a "field" as those terms are used in common speech. For example, a thickly wooded area nonetheless may be an open field as that term is used in construing the Fourth Amendment.

466 U.S. at ——, 104 S.Ct. at 1742, 80 L.Ed.2d at 225 n. 11. The term has been applied to land which is fenced or posted and to vacant lots in urban areas, open beaches, reservoirs, and open waters. *See* LaFave, *Search & Seizure* (1978) § 2.4 nn. 5-13. We have found no case, however, applying the term to a building of any consequence.

Fourth amendment protection has been extended to commercial buildings, warehouses, containers, modes

of transportation, even telephone booths, in short, nearly any structure or item in which a person has a reasonable expectation of privacy. *Donovan v. Dewey*, 452 U.S. 594, 101 S.Ct. 2534, 69 L.Ed.2d 262 (1981) (stone quarry); *Michigan v. Tyler*, 436 U.S. 499, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1979) (furniture store); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978) (electrical and plumbing installation facilities); *See v. Seattle*, 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967) (warehouses); *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 97 S.Ct. 619, 50 L.Ed. 2d 530 (1977) (leasing offices); *Mancusi v. DeForte*, 392 U.S. 364, 88 S.Ct. 2120, 20 L.Ed.2d 1154 (1968) (union offices); *Stoner v. California*, 376 U.S. 483, 84 S.Ct. 889; 11 L.Ed.2d 856 (1964) (hotel rooms); *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (telephone booth); *United States v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977) (footlocker); *Arkansas v. Sanders*, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979) (luggage); *Preston v. United States*, 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed. 2d 777 (1974) (vehicle); *United States v. Ehrlichman*, 546 F.2d 910 (D.C.Cir.1976) (psychiatrist office); *Piazzola v. Watkins*, 442 F.2d 284 (5th Cir.1971) (college dormitory room); *United States v. Duckett*, 583 F.2d 1309 (5th Cir.1978) (mail); *United States v. Nasser*, 476 F.2d 1111 (7th Cir.1973) (government office); *United States v. Speights*, 557 F.2d 362 (3rd Cir.1977) (lockers); *United States v. Trickey*, 711 F.2d 56 (6th Cir.1983) (outbuilding of printing business); *United States v. Emens*, 649 F.2d 653 (9th Cir.1980) (boats). A barn is as much a part of a rancher's place of business as a warehouse or outbuilding is part of an urban merchant's place of busi-

ness. It is and ought to be constitutionally protected from warrantless searches if the owner or occupier takes reasonable steps to effect privacy. For as the Court noted in *Katz v. United States*, 389 U.S. at 351, 88 S.Ct. at 511, 19 L.Ed.2d at 582 "the Fourth Amendment protects people not places."

Dunn took a number of steps to preserve privacy. Some result from the layout of his ranch and others from his affirmative acts. These steps, with different applications and different weights, all factor into the final conclusion. The barn was located in a clearing surrounded by woods on a 198 acre tract. The ranch was circled by a perimeter fence. The ranch house and buildings were at the end of a private drive approximately one-half mile from a public road. The entrance to the private driveway was secured by a locked chain. The barn was not visible from the public road or perimeter fence. The contents of the barn could not be seen from aerial observation, nor were the contents visible from the ground unless one approached the barn, penetrated its encircling fence, walked under its overhang and stood next to its fish-net front covering. Even then, entry could be made only by force or the hurdling of wooden gates which were locked.

Considering the location, type and placement of the structure, and the other steps Dunn took to limit access to the barn, we find that Dunn had a reasonable expectation of privacy in his barn and its contents. Accordingly, the fourth amendment abrogates the warrantless intrusion by agent Gospodarek and officer Fite on the night of November 5, 1980. That search required a search warrant.

In our original opinion vacated by the Supreme Court we reached the conclusion that the viewing of the barn and its contents by Gospodarek and Fite

was violative of the fourth amendment because the barn was within the protected ambit of the curtilage. We have again reached the conclusion that the barn was subject to constitutional protection, separate and apart from any consideration of the curtilage conundrum. We must now address the remaining issues raised by this appeal which were resolved in the original opinion.

Convinced beyond peradventure that *Oliver* has no impact on those parts of our opinion subtitled "Probable Cause and Exigent Circumstances" and "Dunn's Statements," 674 F.2d 1100-03, we reinstate those paragraphs, the same as if set forth here in extenso and verbatim. We repeat only the final paragraph.

The convictions of Ronald Dale Dunn are REVERSED and the matter is REMANDED for further proceedings not inconsistent herewith.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-1200

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

versus

RONALD DALE DUNN, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Western District of Texas

[Filed Nov. 14, 1985]

ON SUGGESTION FOR REHEARING EN BANC
Before WISDOM, POLITZ, and TATE, Circuit Judges.

PER CURIAM:

A member of this court having requested a poll on the suggestion for rehearing en banc, the order dated September 11, 1985 denying rehearing and rehearing en banc was suspended. The poll was taken and a majority of the judges in active service having voted against a rehearing en banc, the petition for rehear-

ing with suggestion for rehearing en banc is DENIED; further, the order denying the petition for panel rehearing is reinstated and said petition is herewith DENIED.

ENTERED FOR THE COURT

/s/ Henry A. Politz
United States Circuit Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-1200

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

versus

RONALD DALE DUNN and
ROBERT LYLE CARPENTER, DEFENDANTS-APPELLANTS

Appeal from the United States District Court
for the Western District of Texas

ON SUGGESTION FOR REHEARING EN BANC
(Opinion 7/16/85, 5 Cir., 198—, —— F.2d ——)

(September 11, 1985)

Before WISDOM, POLITZ, and TATE, Circuit Judges.

PER CURIAM:

(✓) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be

polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT

/s/ Henry A. Politz
United States Circuit Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 81-1200

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

RONALD DALE DUNN and
ROBERT LYLE CARPENTER, DEFENDANTS-APPELLANTS

May 7, 1982

Rehearing Denied June 28, 1982

Appeals from the United States District Court
for the Western District of Texas

Before WISDOM, POLITZ and TATE, Circuit Judges.

POLITZ, Circuit Judge:

Ronald Dale Dunn and Robert Lyle Carpenter were found guilty by a jury of conspiring to manufacture phenylacetone and amphetamine, and to possess amphetamine with intent to distribute, in violation of 21 U.S.C. § 846. Dunn also was convicted for manufacturing the two controlled substances and for possessing amphetamine with intent to distribute. 21

U.S.C. § 841(a)(1). The jury convicted Carpenter of aiding and abetting Dunn in the unlawful manufacturing and possessing. 18 U.S.C. § 2.

Carpenter challenges the sufficiency of the evidence supporting his convictions, particularly that which ties him to Dunn's activities. We are not persuaded; Carpenter's convictions are affirmed. Dunn appeals the trial court's refusal to suppress physical evidence, obtained as a result of warrantless searches of his ranch near Johnson City, Texas, and certain statements he made after arrest. Finding merit in this assignment of error, we reverse and remand.

Background Facts

A careful marshalling of the facts usually is required for appellate review for few, if any, legal questions may be resolved in a factual vacuum. Detailing of facts is particularly critical in cases in which the controlling precedent is less than precise and the perceived distinguishing features are less than overwhelming. The case before us belongs in that category, for in its resolution we are propelled into the amorphous realm of constitutional discussion subtitled "reasonable expectations of privacy." Our task in this context is to separate that which falls within the aegis of this fourth amendment buckler from that which does not. *See, e.g., Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978); *Katz v. United States*, 389 U.S. 347, 361, 88 S.Ct. 507, 516, 19 L.Ed.2d 576, 587 (1967) (Harlan, J., concurring).

The factual scenario began in the summer of 1980 with the surveillance of Carpenter, in and around the Houston, Texas area, by agents of the Drug Enforcement Administration (DEA). Carpenter was accumulating large quantities of chemicals and equipment used in the manufacture of controlled sub-

stances, particularly amphetamine and phenylacetone. Some of the purchases were made in his name, some were made in the name of Omega, Inc., a corporation of which he was president, and some were made under the alias "Jack Carter." The equipment acquired included several hot plate stirrers.

A hot plate stirrer is an electric heating device that applies heat to a container and, by use of a built-in magnet, stirs the contents. Stirrers are used in the "cooking" of chemicals.

When Carpenter placed his order for stirrers, DEA Agent Robert Surovec secured a warrant from a Texas state judge authorizing the installation and operation of an electronic beeper in a stirrer. The beeper was installed and activated. Thereafter, on September 3, 1980, Carpenter took possession of the rigged stirrer and was tracked to his residence in Spring, Texas. A few days later the signal from this beeper was lost, to be re-discovered in early November 1980, on Dunn's ranch in Blanco County, Texas.

In the meantime, DEA Agent Ronald Gospodarek secured the installation of a beeper in a 55 gallon plastic drum which was to be used to deliver acetic anhydride ordered by Carpenter. Simultaneously, plans were completed to install a beeper in a container filled with 100 pounds of phenylacetic acid, a precursor to phenylacetone, which Carpenter had ordered. Warrant authorization was granted by state authorities. Thereafter, the drum and container, laden with the chemicals and beepers, were delivered to Carpenter.

The drum and container beepers were monitored from October 27, 1980 until November 5, 1980. On the latter date, Gospodarek and other officers, homing on the container beeper, trailed Carpenter, driving a pickup truck, from Houston to Ronald and

Betty Dunn's ranch near Johnson City, Texas. Aerial surveillance disclosed the truck backed up to a barn behind the ranch residence, apparently for the unloading of its contents. It was at this time that the hot plate stirrer beeper, lost in early September, was detected. It, too, was on the ranch property.

On the afternoon of November 5, 1980, DEA agents took aerial photographs of the ranch. The photographs showed a ranch house set back approximately ½ mile from a public road, at the end of a private driveway, a smaller house immediately next to the main residence, a windmill, a water tank, and two barns approximately 50 yards behind the house. The residence enclave was surrounded by trees and the ranch acreage was circled by a perimeter fence. There were several interior fences near the buildings and at other locations. The private driveway was secured by a locked chain.

Around 9:00 p.m. on the night of November 5, 1980, after studying the photographs, Gospodarek and Officer Martin Fite of the Houston Police Department crossed the perimeter fence and approached the confines containing the buildings. They became disoriented in the dark but eventually came to the driveway leading to the residence. They went to a fence at the rear of the ranch house and there detected a strong odor of phenylacetic acid.[1] Crossing another fence, they looked into one pole barn and saw only empty boxes. Then they walked under the tin overhang of the second barn, up to a closed gateway. With the aid of their flashlights, they looked through

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[1] Gospodarek initially testified at the suppression hearing that he was unaware that he was on Dunn's property when he first noted the odor of phenylacetic acid. That he was on Dunn's ranch, however, is established beyond doubt by his further testimony and the other evidence. *See* note 2, *infra*.

the barn's openings and noted its contents. They saw chemicals and chemical equipment in a setting taken to be a phenylacetone laboratory.

Their mission completed, Gospodarek and Fite withdrew. Shortly afterwards, Gospodarek telephoned Surovec and reported the findings. Adding this information to that already in hand, Surovec began preparing an affidavit for a warrant to search the ranch.[2] The drafting was completed on November 6, 1980.

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[2] Surovec's affidavit stated:

> At about 10:55 p.m., on November 5, 1980, Agent Gospodarek telephonically advised me that he and Houston Police Officer Martin Fite had walked down a fence line south of the farm which separates Dunn's property from adjacent property. At this time, Agent Gospodarek related to me that he and Officer Fite had smelled a strong chemical odor which indicated to Agent Gospodarek that phenylacetone was being manufactured. Agent Gospodarek and Officer Fite then crossed over the fence and approached the barn-like structure at the rear of the house and at this time observed, with the use of flashlights, that one side of the barn was open and that inside the barn there were three large flasks in a refluxing stage.

Surovec's affidavit continued:

> On the evening of November 5, 1980, Agent Gospodarek telephonically advised me that he had determined through the Blanco Courthouse and through Game Warden Warren Guthrie that the farm consisted of 198.1 acres and had been purchased by Ronald D. Dunn in February 1980.

It is clear from testimony at the suppression hearing that the affidavit contains several misstatements. Although the errors are apparent, the warrant issued on the evening of November 6, 1980 is not invalid for this reason. "Under the holdings in *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), and *United States v. Astroff*, 578 F.2d 133 (5th Cir. 1978), a warrant may be invalidated for misstatements in an affidavit only if the misrepresentations were

On two occasions on November 6, 1980, officers made entry into the ranch and inspected the buildings. In the early afternoon, Gospodarek, accompanied by DEA Agent Fred Thomas, returned to see in daylight what had been observed by flashlight. They had no warrant authorization, although Agent Surovec was in the process of preparing the supporting affidavit. While on the property, they installed one electronic surveillance device on the private drive, just off the public road, and another on the gate of the barn housing the laboratory. The devices were placed on Dunn's property without prior warrant authorization.[3]

At approximately 6:00 p. m. that same day, Surovec completed preparation of the warrant affidavit and, accompanied by DEA chemist Buddy Goldston and DEA technician Wayne Moody, he presented the warrant request to a federal magistrate. A warrant to search the Dunn ranch was issued at 8:30 p. m. on the night of November 6, 1980.

While Surovec was requesting the warrant from the magistrate, Gospodarek, accompanied by other agents, again made entry. Gospodarek looked for vehicles or persons. He also checked the suspect barn before withdrawing.

On the night of November 7, 1980, Goldston and Fite again entered the Dunn property. This was the first post-warrant visit to the ranch. They made no effort to effect seizures pursuant to the warrant, de-

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material and intentional." United States v. Lewis, 621 F.2d 1382, 1389 (5th Cir. 1980) (emphasis added). No evidence of intentional misrepresentation was offered.

[3] The electronic sensors were not designed to intercept conversations. They were placed near the driveway and on the barn gate to detect the passage of vehicles or persons.

spite the claim of exigent circumstances set forth in the affidavit,[4] but merely observed the laboratory and departed.

At approximately 10:00 a. m. on November 8, 1980, the warrant was executed. DEA agents, accompanied by state law enforcement personnel, drove to the ranch and found Dunn. Officer Fite, armed with a shotgun, arrested Dunn, placed him in handcuffs, and escorted him into the ranch house while other officers loaded the chemicals and equipment and searched the premises.

Dunn was informed of his *Miranda* rights.[5] Thereafter, in response to a question whether any controlled substances were in the house, he directed the officers to a closet which contained bags of amphetamine.[6]

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[4] The warrant affidavit reads:

> Affiant states that the contraband in the instant case is such that it can be easily destroyed and that since the illicit manufacture of phenylacetone, amphetamine and methamphetamine is a process taking several hours and often conducted through the night-time hours as well as the daytime, affiant requests authority to execute at any time (day or night).

[5] Under *Miranda v. Arizona*, 384 U.S. 436, 479, 86 S.Ct. 1602, 1630, 16 L.Ed.2d 649 (1966), the accused must be informed "that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. . . ."

[6] A dispute exists whether Dunn asserted or waived his right to the presence of counsel before speaking. Dunn's account is supported by the testimony of one agent who recalled that Dunn said he would "like to talk to his lawyer prior to making a decision." It is possible that *Miranda* and its progeny may have compelled the cessation of questioning. We do not

The Fourth Amendment Conundrum

The fourth amendment challenge to the evidence obtained from the execution of the search warrant, as well as to the evidence resulting from the earlier visits to the ranch, squarely presents the elusive expectation of privacy issue. If Dunn's fourth amendment protections were abrogated by the entries on November 5 and 6, the evidence discovered at that time and later seized pursuant to the warrant [7] must be excluded and Dunn's convictions must be set aside. That same reasoning does not apply to Carpenter since he cannot assert a legitimate expectation of privacy in any place searched or item seized.[8]

Although not specifically enumerated in the Constitution, the right of privacy long has been recognized.[9]

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decide that issue, however; our disposition of the appeal makes the resolution of this question unnecessary.

[7] The bulk of the warrant affidavit was composed with information obtained as a result of the warrantless entries on November 5 and 6.

[8] Carpenter neither enjoyed nor claimed any possessory or proprietary interest in the Dunn ranch or in the items found therein. In *United States v. Salvucci*, 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980), the Supreme Court rejected the automatic standing rule for possession offenses of *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960). As a consequence, Carpenter is without standing to assert a fourth amendment claim. *See United States v. Whitley*, 670 F.2d 617 (5th Cir. 1982). *See also Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978); *United States v. Meyer*, 656 F.2d 979 (5th Cir. 1981).

[9] Writing in another context, Justice Blackmun noted that while the

> Constitution does not explicitly mention any right of privacy . . . a line of decisions . . . going back . . . as far as *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251, 11

Property interests once were considered paramount in fourth amendment applications. *See, e.g., Goldman v. United States*, 316 U.S. 129, 62 S.Ct. 993, 86 L.Ed. 1322 (1942); *Olmstead v. United States*, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928).[10] But as the Supreme Court observed in *Rakas v. Illinois*, its decision in *Katz v. United States* repudiated *Olmstead* and *Goldman* and "held that capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place

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> S.Ct. 1000 [1001] 35 L.Ed. 734 (1891) . . . has recognized that a right of personal privacy, or a guarantee of certain . . . zones of privacy does exist under the Constitution. In varying contexts, the Court . . . found . . . the roots of that right in the First Amendment . . .; in the Fourth and Fifth Amendments . . .; in the penumbras of the Bill of Rights, . . . in the Ninth Amendment . . .; or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment. . . .

Roe v. Wade, 410 U.S. 113, 152, 93 S.Ct. 705, 726, 35 L.Ed.2d 147, 176 (1973) (citations omitted).

[10] Justice Brandeis' *Olmstead* dissent provides a more modern perspective of the intent of the framers in drafting the fourth amendment:

> They conferred, as against the Government, the *right to be let alone*—the most comprehensive of rights and the right most valued by civilized men. To protect the right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed must be deemed a violation of the Fourth Amendment.

277 U.S. at 478, 48 S.Ct. at 572, 72 L.Ed. at 954 (Brandeis, J., dissenting) (emphasis added). More recently, it has been stated that "[t]he central purpose of the Fourth Amendment is to safeguard the privacy and security of individuals against arbitrary invasions by government officials." *South Dakota v. Opperman*, 428 U.S. 364, 377, 96 S.Ct. 3092, 3101, 49 L.Ed.2d 1000, 1009-10 (1976) (Powell, J., concurring) (citations omitted).

but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." 439 U.S. at 143, 99 S.Ct. at 430, 58 L.Ed.2d at 401. *See United States v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977); *United States v. White*, 401 U.S. 745, 91 S.Ct. 1122, 28 L.Ed.2d 453 (1971). However, considerations of property interests are not irrelevant to the legitimate expection of privacy analysis, for "by focusing on legitimate expectations of privacy in Fourth Amendment jurisprudence, the Court has not altogether abandoned use of property concepts in determining the presence or absence of the privacy interests protected by that Amendment." *Rakas v. Illinois*, 439 U.S. at 153 n.12, 99 S.Ct. at 431 n.12, 58 L.Ed.2d at 401 n.12. The decisional standard developed in *Rakas* traces Justice Harlan's suggestion in his concurrence in *Katz*, specifically, the individual asserting the privacy interest must demonstrate an actual (subjective) expectation of privacy and the expectation must be in accord with societal notions of reasonableness.[11]

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[11] In invigorating the phrase "reasonable expectation of privacy," the Supreme Court has suggested that a weighing of the government's interest in the public health and welfare against the individual's rights is required. A balance of competing interests has been referred to as the "ready test for determining reasonableness." *Terry v. Ohio*, 392 U.S. 1, 20-21, 88 S.Ct. 1868, 1879, 20 L.Ed.2d 889 (1968) (*quoting Camara v. Municipal Court*, 387 U.S. 523, 536, 87 S.Ct. 1727, 1734, 18 L.Ed.2d 930 (1967)). *See Brown v. Texas*, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979); *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977); *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975). And as we cryptically have opined: "The metaphysics of property inter-

Dunn maintains that he held a reasonable expectation of privacy over his ranch property and the buildings thereon, particularly the barn and its contents. Evaluation of this contention requires a close look at several essential facts.

The ranch, modest in size for that area of Texas, is approximately 198 acres, and is encircled by a perimeter fence. The residence and the other buildings are in a small clearing almost surrounded by trees. The house and the barns are not visible from the farm to market road; they are not visible from the perimeter fence. There are interior fences, including one around the residence and one around the subject barn. Once inside the perimeter fence, it is necessary to penetrate at least one more fence before reaching the place where the officers stood while examining the interior of the barn.

We commence our legal analysis, mindful of the basic constitutional rule that " 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions,' " *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55, 91 S.Ct. 2022, 2032, 29 L.Ed.2d 564, 576 (1971) (*quoting Katz v. United States*, 389 U.S. at 357, 88 S.Ct. at 514, 19 L.Ed.2d at 585). In that vein, the government's defense of the fourth amendment challenge relies on *United States v. Williams*, 581 F.2d 451 (5th Cir. 1978), *cert. denied*, 440 U.S. 972, 99 S.Ct. 1537, 59 L.Ed.2d 789 (1979), to excuse the necessity for a warrant for the entries of Novem-

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ests and possessory interests under the Fourth Amendment determine whether there is a legitimate expectation of privacy." *United States v. Lewis*, 621 F.2d at 1388.

ber 5 and 6. *Williams* does not support the government's position.

In *Williams*, agents of the Bureau of Alcohol, Tobacco and Firearms (ATF), acting on a tip, visited a site in rural Mississippi which was suspected of housing a "still." The still could not be seen from the public roadway and the agents walked along a perimeter fence, approaching the outbuildings on the property. From the edge of an old fence, outside the curtilage of the farmhouse and perhaps off the subject property, the agents "detected the odor of moonshine liquor and fermented mash coming from the direction of the hogpen." 581 F.2d at 453. The agents crossed the remnants of a fence "at a place where it had been walked down almost to the ground," *id.*, and traced the odors to a large shed. With this information, a search warrant was obtained and executed, at which time Williams was arrested while carrying three gallons of moonshine.[12]

In *Williams*, we recognized that the expectation of privacy test "has done away with outmoded property concepts no longer satisfactory for fourth amendment analysis," *id.* (*citing The Supreme Court, 1967 Term*, 82 Harv.L.Rev. 63, 189 (1968)), but noted that "the distinction between open fields and curtilage is still helpful in determining the existence or not of reasonable privacy expectations." *Id.* (*citing* Note, 76 Mich.L.Rev. 154 (1977)). We further re-

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[12] The *Williams* court noted that "the government unaccountably concedes standing." 581 F.2d at 453 n.2. While the issue of standing to claim a fourth amendment violation was not raised or discussed, it does not appear that Williams possessed any legitimate expectations of privacy over the shed or its contents. In light of the Supreme Court's *Salvucci* opinion and our *Whitley* decision, if Williams' case was tried today, he would not be heard on a fourth amendment challenge.

marked "that open fields surrounding a house are not protected under the fourth amendment and that a search of them need not be accompanied by a warrant issued upon probable cause." *Id.* (*citing United States v. Brown*, 473 F.2d 952 (5th Cir.1973); *Atwell v. United States*, 414 F.2d 136 (5th Cir. 1969); *Hodges v. United States*, 243 F.2d 281 (5th Cir. 1957)).

We concluded that the protected curtilage extended to the shed in question and held that:

> as to outbuildings that are not encompassed by a fence that also includes the house, or perhaps a privacy or exclusionary one around them, the outer limits of the curtilage are defined by the walls of the remote outbuildings.

581 F.2d at 454. Notwithstanding, we determined that the agents had not violated the fourth amendment because they did not enter the shed. Additionally, the dilapidated fence they crossed was not viewed as either a privacy or exclusionary fence, since "in its best days it was meant to do no more than keep the hogs in, not to keep anyone out." *Id.*

Shortly after we rendered our *Williams* decision the Supreme Court announced *Rakas v. Illinois*. We disagree with the suggestion that the decisions are in conflict. Because the boundaries of the farm in *Williams* were not marked, and because the only manifestation of a privacy assertion or a proprietary exclusion was a broken down fence, subjective privacy expectations were lacking. Thus, the *Williams* decisional methodology comports fully with the guide established in *Rakas*.

By contrast, the fence around Dunn's ranch was complete and intact. The barn itself was circled by another substantial fence. Under *Williams* and earlier jurisprudence, *see Walker v. United States*, 225

F.2d 447 (5th Cir. 1955), the barn in question was within the curtilage of the residence and was within the protective ambit of the fourth amendment. "Certainly such buildings give an added expectation of privacy for their contents . . . ." *United States v. Williams*, 581 F.2d at 454. Having reached this conclusion, we must now consider the government's contention that the warrantless entries on November 5 and 6 were justified by exigent circumstances.

Probable Cause and Exigent Circumstances

The government makes a compelling argument that it had probable cause to act, a contention supported by the factual background of the case. The following factors all tend to bolster the reasonable belief that a criminal offense had been or was being committed: the accumulation of equipment and large quantities of chemicals, all purchased with cash and some acquired under a false name; the tracking of the chemicals to the Dunn ranch; the detection of the lost hot plate stirrer beeper signal on the Dunn property; Dunn's prior criminal record; and the remote location of the ranch. Accepting that probable cause to search the ranch property existed on November 5 and 6, a search warrant was mandatory unless exigent circumstances excused that constitutional requirement.

In support of the claim that exigent circumstances validated the warrantless searches, the government relies on *United States v. Villarreal*, 565 F.2d 932 (5th Cir.), *cert. denied*, 439 U.S. 824, 99 S.Ct. 92, 58 L.Ed.2d 116 (1978). Villarreal stands for the proposition that an officer making a legal stop of an automobile, who smells the odor of marihuana coming from the automobile, may conduct a search for that contraband. *See United States v. Barnard*, 553 F.2d

389 (5th Cir. 1977); *United States v. Andrade*, 545 F.2d 1032 (5th Cir. 1977); *United States v. McCrary*, 543 F.2d 554 (5th Cir. 1976); *United States v. Diaz*, 541 F.2d 1165 (5th Cir. 1976). The government attempts to use the thread from these decisions to weave a net in the instant case, suggesting that since an officer who smells the odor of marihuana emanating from an auto legally stopped may search for the source, a DEA agent who smells phenylacetic acid likewise may search for the source. Neither logic nor jurisprudence supports this reasoning, however, for the two situations are not parallel. The officers in the cited cases were performing their duties in a legal fashion; they were where they had a duty and a right to be. While in these positions they detected the odor of contraband. In these situations, they were allowed and were required to seek the source.

But that was not the circumstance in the case at bar. The law enforcement officers were trespassing, having crossed a perimeter fence prior to detecting the suspicious odor. In addition to that basic dissimilarity, the odor detected was not that of a contraband. The officers in the *Villarreal* line of cases smelled a controlled substance; the DEA agent on Dunn's ranch smelled a legal chemical, phenylacetic acid. Even if it had been the odor of contraband, the occurrence of the trespass before the detection would vitiate the use of this information. A release from fourth amendment requirements cannot be based on fourth amendment violations. *See, e.g., Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979); *Sibron v. New York*, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968). *See also Almeida-Sanchez v. United States*, 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973); *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

The cited cases are subject to a further, critical distinction: they all involve an automobile. While motor vehicles and other means of transportation are protected by the fourth amendment,[13] they receive markedly different treatment.[14] Notably, the Supreme Court has observed:

> this Court has recognized significant differences between motor vehicles and other property which permit warrantless searches of automobiles in circumstances in which warrantless searches would not be reasonable in other contexts. . . . The answer lies in the diminished expectation of privacy which surrounds the automobile. . . .

United States v. Chadwick, 433 U.S. at 12, 97 S.Ct. at 2484, 53 L.Ed.2d at 549 (citations omitted). Prac-

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[13] *See, e.g., Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979); *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975); *United States v. Ortiz*, 422 U.S. 891, 95 S.Ct. 2585, 45 L.Ed.2d 623 (1975); *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); *Preston v. United States*, 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed.2d 777 (1964); *Rios v. United States*, 364 U.S. 253, 80 S.Ct. 1431, 4 L.Ed.2d 1688 (1960); *Brinegar v. United States*, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949).

[14] *See, e.g., New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981); *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977); *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976); *South Dakota v. Opperman*, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976); *Cardwell v. Lewis*, 417 U.S. 583, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974); *Adams v. Williams*, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972); *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970); *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925). *See also United States v. Michael*, 645 F.2d 252 (5th Cir. 1981) (en banc).

ically speaking, when a vehicle is involved and probable cause to search exists, exigent circumstances usually are present.[15]

The contention that exigent circumstances existed in the present case is belied by the facts perceivable at the time, confirmed with the 20/20 visual acuity of hindsight.[16] Although the agents expressed concern that the laboratory might be dismantled and moved before a warrant could be obtained, this argument is not persuasive. The area was remote. Access was limited, particularly vehicle ingress and egress. In addition, the ranch property was subject to surveillance readily from both the ground and the air.

Moreover, in light of the actions of the agents, the protestations of urgency, including those recited in the warrant affidavit, are not convincing. Although obtained on the night of November 6, 1980, the warrant was not executed until approximately 10:00 a.m. on November 8, despite the entry of agents on November 7. The necessity for swift action, which purportedly justified the warrantless entries on Novem-

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[15] The "inherent mobility of automobiles creates circumstances of such exigency that, as a practical necessity, rigorous enforcement of the warrant requirement is impossible." *South Dakota v. Opperman*, 428 U.S. at 367, 96 S.Ct. at 3096, 49 L.Ed.2d at 1004 (citations omitted). Even disregarding the issue of mobility, "less rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than relating to one's home or office." *Id.* (footnote omitted). *See Cady v. Dombrowski*, 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973); *Cooper v. California*, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967).

[16] The determination of probable cause and exigent circumstances must be based on the circumstances as they existed at the time of the challenged action, and must be viewed from the perspective then obtaining. Our reference to hindsight in no way modifies that well-established rubric.

ber 5 and 6, is not apparent in the officers' post-warrant conduct.

The government bears the burden of justifying a warrantless search. *United States v. De LaFuente*, 548 F.2d 528 (5th Cir.), *cert. denied*, 431 U.S. 932, 97 S.Ct. 2640, 53 L.Ed.2d 249 (1977). *See United States v. Osborne*, 630 F.2d 374 (5th Cir. 1980), *cert. denied*, 450 U.S. 934, 101 S.Ct. 1398, 67 L.Ed.2d 369 (1981). It has not borne this burden. Consequently, the evidence gathered during the search on November 8, 1980, by virtue of a warrant issued on the basis of information collected during unconstitutional entries and viewings, should have been excluded from the case against Dunn. Admission of the evidence was reversible error which mandates a remand for a new trial.

Dunn's Statements

In determining whether Dunn's inculpatory statements uttered shortly after his arrest on November 8 must be excluded from evidence, we are guided by the teachings of *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), and *United States v. Ceccolini*, 435 U.S. 268, 98 S.Ct. 1054, 55 L.Ed.2d 268 (1978). *See, e.g., United States v. Vicknair*, 610 F.2d 372 (5th Cir.), *cert. denied*, 449 U.S. 823, 101 S.Ct. 83, 66 L.Ed.2d 25 (1981). The district court declined to suppress the remarks Dunn made at the time of his arrest. We must decide whether the illegality of the warrantless searches, which led to the issuance of the search warrant and to Dunn's arrest, irretrievably tainted those statements.

We are aware of no bright-line formula to resolve the dilemma and we are mindful that "[n]ot every fruit that grows from poisonous trees is constitu-

tionally lethal." *United States v. Vicknair*, 610 F.2d at 381. Exclusion is not justified if the government demonstrates that the connection between an illegal search and the evidence obtained has become "so attenuated as to dissipate the taint." *Nardone v. United States*, 308 U.S. 338, 341, 60 St.Ct. 266, 268, 84 L.Ed. 307, 312 (1939).[17] While degrees of attenuation necessarily are determined on a case-by-case basis, the *Ceccolini* Court offered the following methodological outline:

> Evaluating the standards for application of the exclusionary rule to live-witness testimony . . ., we are first impelled to conclude that the degree of free will exercised by the witness is not irrelevant in determining the extent to which the basic purpose of the exclusionary rule is advanced by its application. This is certainly true when the challenged statements are made by a putative defendant after arrest, *Wong* [*v. United States*, 371 U.S. at 491, 83 S.Ct. at 407]; *Brown v. Illinois* [422 U.S. 590, 603, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975)], and a *fortiori* is true of testimony given by nondefendants.

435 U.S. at 276, 98 S.Ct. at 1060, 55 L.Ed.2d at 277.

We are in accord with the analysis of our colleagues of the Ninth Circuit who distinguished "the

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[17] The "independent source" doctrine which also excuses the exclusion of certain evidence, *see, e.g., Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920); *United States v. Fredericks*, 586 F.2d 470 (5th Cir. 1978), *cert. denied*, 440 U.S. 962, 99 S.Ct. 1507, 59 L.Ed.2d 776 (1979), does not apply to the instant factual situation. Nor does the "inevitable discovery" principle, *see, e.g., Brewer v. Williams*, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977), fit this case.

'live witness' testimony of a potential co-defendant . . . [from] that of a witness not arrested and not implicated in the criminal activities at issue." *United States v. Humphries*, 600 F.2d 1238, 1247 (9th Cir. 1979), *cert. denied*, 451 U.S. 988, 101 S.Ct. 2324, 68 L.Ed.2d 846 (1981). In the present case, Dunn was arrested; he uttered the incriminating statements shortly thereafter. The inculpatory statements were the product of the prior illegality and not of his free will. The arrest was related directly to a search which was authorized on the basis of recent violations of Dunn's privacy rights. Although the matter is not free from difficulty, we are convinced that the taint of the unlawful entries onto the Dunn ranch, which culminated in Dunn's arrest on the premises, had not been so attenuated as to permit use of the statements against Dunn.

Carpenter—Sufficiency of the Evidence

Carpenter contends that the evidence is insufficient to sustain his convictions. We disagree. Viewing the evidence in the light most favorable to the government, *see, e.g., Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *United States v. Ocanas*, 628 F.2d 353 (5th Cir. 1980), we conclude that the jury could properly find Carpenter guilty beyond a reasonable doubt.

The convictions of Robert Lyle Carpenter are AFFIRMED.

The convictions of Ronald Dale Dunn are REVERSED and the matter is REMANDED for further proceedings not inconsistent herewith.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-1200

D. C. Docket No. A-80-CR-89

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

versus

RONALD DALE DUNN, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Western District of Texas

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[Filed Sept. 26, 1985]

Before WISDOM, POLITZ, and TATE, Circuit Judges.

JUDGMENT ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

This cause came on to be heard on remand from the Supreme Court of the United States and on further briefs on the parties.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgments of the District Court in this cause are reversed, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

July 16, 1985

Issued as Mandate: July 16, 1985

Reissued as Mandate: Sep. 24, 1985

Reissued as Mandate: Nov. 26, 1985

☆ U. S. GOVERNMENT PRINTING OFFICE: 1985 491507 20069

EDITOR'S NOTE

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

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SUPREME COURT, U.S.

UNITED STATES OF AMERICA)

V) NO. 85-998

RONALD DALE DUNN)

MOTION TO PROCEED
IN FORMA PAUPERIS

COMES NOW the Respondent, RONALD DALE DUNN, and based upon the attached affidavit request that he be granted the authority to proceed in forma pauperis.

Respectfully submitted,

LOUIS DUGAS, JR., P.L.C.

LOUIS DUGAS, JR.
1804 N. 16th Street
Orange, Texas 77630
409-883-3506
State Bar Card No. 06173000

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

UNITED STATES OF AMERICA)

V) NO. 85-998

RONALD DALE DUNN

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED
ON APPEAL IN FORMA PAUPERIS

I, RONALD DALE DUNN, being first duly sworn, depose and say that I am the respondent, in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor.

I further swear that the response which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? yes

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. $140.00 / MONTH
Federal Correctional Institution
P.O. Box 1010
Bastrop, Texas 78602

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month you received.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? No

a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings accounts: No

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? No

a. If the answer is yes, described the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Betty Jean Dunn - Wife
Coquina A. Dunn - Daughter
Asa Edward Dunn - Son

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Ronald Dale Dunn
RONALD DALE DUNN

STATE OF TEXAS)
COUNTY OF BASTROP)

Subscribed and sworn to before me this 17th day of December, 1985.

Pat Reid
NOTARY PUBLIC

CASE MANAGER FCI BASTROP TX.
AUTHORIZED BY THE ACT OF JULY 7, 1955
TO ADMINISTER OATHS (18 U.S. C. 4004)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

UNITED STATES OF AMERICA	)	
V.	)	NO. 85-998
RONALD DALE DUNN	)	

CERTIFICATE OF SERVICE

LOUIS DUGAS, JR., hereby certifies that he is a member of the bar of the Supreme Court of the United States and counsel for Ronald Dale Dunn, Respondent in the above matter; and that a true and correct copy of the above and foregoing Motion to Proceed In Forma Pauperis and Affidavit have been mailed to the attorney for the Petitioner, the Honorable Charles Fried, Solicitor General of the United States of America, by mail, postage prepaid, on this 10th day of February, 1986.

LOUIS DUGAS, JR.

NO. 85-998

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

V.

RONALD DALE DUNN

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEAL
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

LOUIS DUGAS, JR.
1804 N. 16th Street
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409-883-3506

Attorney for Respondent

QUESTION PRESENTED

Where a barn is located in a clearing surrounded by woods on a 198-acre ranch circled by a perimeter fence; ranch house and buildings are located at the end of a private drive approximately one half mile from public road; entrance to private road secured by locked chain; barn was not visible from the public road or perimeter fence; contents of barn could not be seen from air or ground unless barn approached by one penetrating encircling fence, walked under its overhang, stood next to fishnet front covering; and entry could be made only by force or hurdling wooden gates which were locked; is the owner of the barn entitled to a reasonable expectation of privacy in this barn?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

NO. 85-998

UNITED STATES OF AMERICA, PETITIONER

V.

RONALD DALE DUNN

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals on remand from this Court is reported at 755 F.2d 880. The original opinion of the court of appeals is reported at 674 F.2d 1093. The opinion vacating 766 F.2d 880 is attached as Appendix 1.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

STATEMENT OF THE CASE

Respondent is in agreement with much of petitioner's statement of the case. The following constitute the respondent's statement of the area with which he disagrees with the petitioner.

After trespassing upon the ranch owned by Ronald Dale Dunn and conducting a visual and systematic search of the barns, garage, house and carport areas of the ranch, officers came to the barn where they smelled an odor which was not contraband. They tried a door to

the barn and found it locked. They crossed another fence and at that point they were right underneath the overhang of the barn where a gate led further into the barn. They tried this gate and found it locked and shut. Above this gate was a netting which hung from the ceiling to the gate. They stood right at the gate and began their search with the aid of flashlights. R-4-80.

The officers looked into the carport and then tried to enter the garage by trying the windows and the doors and everything was locked up. These trespassing officers searched only buildings on the property. R-4-83.

ARGUMENT

The government's simplified approach to the facts makes it appear there is no distinction between county and city. The question presented: Whether a search warrant is needed to peer into the open side of a barn that is located in an open field, further lends the impression that one can peer into a barn as easily as one peers into the show windows of Bergdorf-Goodman in New York City. The government in its petition additionally says:

(1) ". . . the police were entitled to approach the barn just as a member of the public might reasonably have been expected to do." (Pet. Cert. 8)

(2) "Respondent had no reasonable expectation that a member of the public would not thereon look into the side of the barn, and the Fourth Amendment does not prevent a police officer from doing the same thing." (Pet. Cert. 8)

(3) ". . . places open to the public."

(4) ". . . for he had quite clearly exposed it to public view . . ."

Somehow the government attempts to reconcile the barn with the show windows on Fifth Avenue in New York City.

The fallaciousness of the government's statements is revealed when the location of the barn is properly stated. The private driveway was secured by a locked chain. No member of the public could enter. The private driveway was approximately one half mile in length. The public could not travel this road. The barn was located in a clearing surrounded by woods, circled by a perimeter fence and not visible from the public road or the perimeter fence. The contents were not visible to anyone unless one approached the barn, penetrated its encircling fence, walked under its overhang and stood next to its fishnet front covering. There was no way for a member of the public to have been present on Dunn's land without being a trespasser or invitee.

The decision below was clearly correct in that Dunn had taken a number of steps to protect his privacy and to bar the public from his property as set out above. A search warrant was required to search the barn.

CONCLUSION

For the above reasons, Respondent respectfully request that the petition for writ of certiorari be denied.

Respectfully submitted,

LOUIS DUGAS, JR., P.L.C.

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State Bar Card # 06173000
Attorney for Respondent

A P P E N D I X

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 81-1200

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RONALD DALE DUNN,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas

(February 4, 1986)

Before WISDOM, POLITZ, and TATE, Circuit Judges.

PER CURIAM:

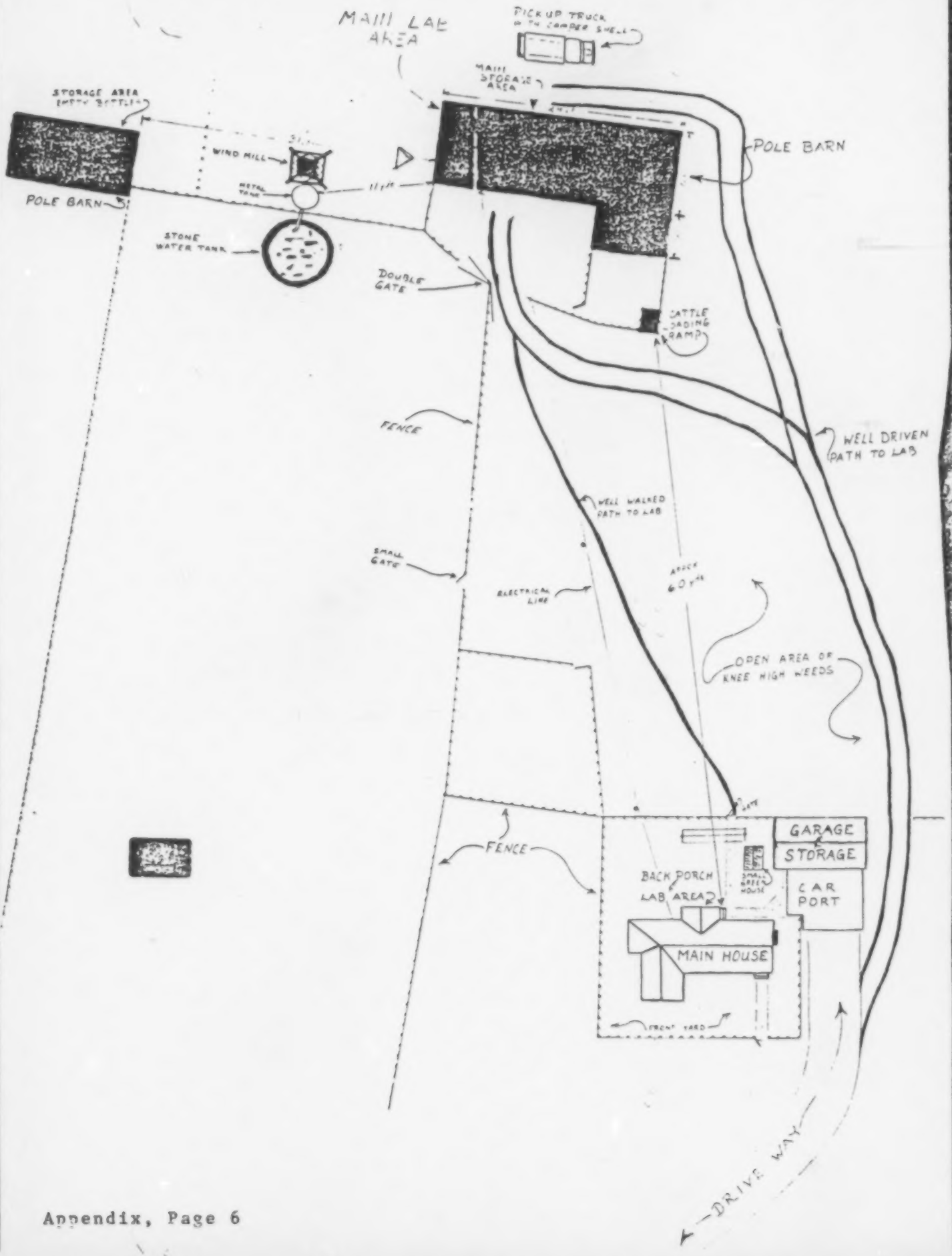
Upon first consideration of this appeal we reversed the convictions of Ronald Dale Dunn finding, inter alia, that a barn which was the subject of a warrantless search was within the protected curtilage of the Dunn ranch house. **United States v. Dunn**, 674 F.2d 1093 (5th Cir. 1982). The Supreme Court granted the government's petition for writ of certiorari, **United States v. Dunn**, 467 U.S. 1201, 104 S.Ct. 2380, 81 L.Ed.2d 340 (1984), and vacated our disposition of Dunn's appeal, remanding "for further consideration in light of **Oliver v. United States**," 466

U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984). On remand we held that the barn in question was not within the curtilage, **United States v. Dunn**, 766 F.2d 880 (5th Cir. 1985). By an Order dated January 17, 1986, we vacated that opinion and returned the matter to the panel.

Upon further collegial consideration of the mandate of the Supreme Court in the course of the disposition of the government's petition for rehearing with suggestion for rehearing en banc, we have determined that the holding and teachings of **Oliver v. United States** neither direct nor require that the subject barn be found to be outside the curtilage of the Dunn ranch house. We again have examined painstakingly the facts reflected in this record, as set forth in detail in our two prior panel opinions, against the backdrop of **Oliver v. United States** and other decisions of the Supreme Court and of this court. To reflect the relative positions of the buildings and improvements, we attach a site plat of the ranch house enclave which was filed in evidence as a government exhibit. Upon studied reflection, we now conclude and hold that the barn was inside the protected curtilage.

Accordingly, we reinstate the opinion rendered on May 7, 1982, reported at 674 F.2d 1093 (5th Cir. 1982), as our disposition of this appeal by Ronald Dale Dunn.

PRIOR OPINION REINSTATED.


MAIN LAB AREA
PICK UP TRUCK W/ CAMPER SHELL
MAIN STORAGE AREA
STORAGE AREA EMPTY BOTTLES
POLE BARN
WIND MILL
METAL TANK
STONE WATER TANK
POLE BARN
DOUBLE GATE
CATTLE LOADING RAMP
FENCE
WELL DRIVEN PATH TO LAB
WELL WALKED PATH TO LAB
SMALL GATE
ELECTRICAL LINE
APPROX 60 YDS
OPEN AREA OF KNEE HIGH WEEDS
GATE
FENCE
GARAGE
STORAGE
BACK PORCH
LAB AREA
SMALL GREEN HOUSE
CAR PORT
MAIN HOUSE
FRONT YARD
DRIVE WAY

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

NO. 85-998

UNITED STATES OF AMERICA, PETITIONER

V.

RONALD DALE DUNN

CERTIFICATE OF SERVICE

LOUIS DUGAS, JR., hereby certifies that he is a member of the bar of the Supreme Court of the United States and counsel for RONALD DALE DUNN, Respondent in the above matter; and that a true and correct copy of the above and foregoing Brief in Opposition has been mailed to the attorneys for the Petitioner, the Honorable Charles Fried, Solicitor General of the United States of America, by mail, postage prepaid, on this 19th day of February, 1986.

LOUIS DUGAS, JR.

Supreme Court, U.S.
FILED
APR 4 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-998

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

RONALD DALE DUNN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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REVISED QUESTION PRESENTED

Whether the area near a barn located well outside a fence that surrounds a ranch house is part of the "curtilage" of that house.

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v.

RONALD DALE DUNN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT

There have been several developments in this case subsequent to the time that our petition was prepared.[1] On December 9, 1985, two opinions were

[1] The government's petition for rehearing was first denied on September 11, 1985. That order was later suspended, then reinstated on November 14, 1985 (see Pet. 2 n.1). The government filed its petition on December 10, 1985, the latest date permitted under the Rules of this Court. (At the time the petition was filed, the government had not yet received the December 9 opinions dissenting from denial of rehearing en banc.)

entered, joined by a total of four judges, dissenting from denial of rehearing en banc (App., *infra*, 38a-45a, 46a). On December 16, 1985, another opinion was entered, joined by two other judges, also dissenting from denial of rehearing en banc (*id.* at 47a). On January 17, 1986, the panel entered an order recalling and vacating the judgment that had been entered in this case on July 16, 1985 (*id.* at 48a).

On February 4, 1986, the court vacated the opinion of September 11, 1985, which had formed the basis for the instant petition, and reinstated its opinion of May 7, 1982 (674 F.2d 1093; Pet. App. 16a-35a). See App., *infra*, 49a-51a. The 1982 opinion had previously been vacated by this Court and remanded for reconsideration in light of *Oliver* v. *United States*, 466 U.S. 170 (1984). The court of appeals explained in its brief order (App., *infra*, 50a): "Upon further collegial consideration of the mandate of the Supreme Court in the course of the disposition of the government's petition for rehearing with suggestion for rehearing en banc, we have determined that the holding and teachings of *Oliver* v. *United States* neither direct nor require that the subject barn be found to be outside the curtilage of the Dunn ranch house."[2] After reexamining the facts, the court, "[u]pon studied reflection," concluded that "the barn was inside the protected curtilage" (*ibid.*).

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[2] In its original opinion on remand the court had stated that "[t]he lessons of *Oliver* are clear as applied to a part of the instant inquiry" (Pet. App. 6a) and concluded that the agents did not violate the Fourth Amendment in approaching the barn and that the barn was not within the curtilage (*id.* at 6a-8a).

REASONS FOR GRANTING THE PETITION

1. The court of appeals' latest order has changed the nature of the question presented in this case. The decision below no longer stands for the proposition that a government official is prohibited from looking into an enclosure while standing in a place to which the public has access. Instead, the court of appeals has held that the police here violated the Fourth Amendment by *approaching* respondent's barn because that approach entered into an area characterized by the court as "curtilage"—one in which the respondent had a protected expectation of privacy. As discussed in our petition for certiorari (No. 82-508) from the 1982 judgment and opinion that has now been reinstated by the court of appeals, the court could not have found that the area near the barn was "curtilage" in the traditional sense because it did not suggest any way in which that area was associated with a residence. Indeed, that area was separated from the residence by a fence (see 674 F.2d at 1099). The map attached to the court of appeals' most recent opinion (App., *infra*, 51a) plainly shows that the drug laboratory was situated a considerable distance from the area surrounding the house that would ordinarily be thought of as curtilage. Rather, the court found that the officers' entry here violated an expectation of privacy because the officers crossed two fences to reach it—one of which was a perimeter fence enclosing the entire 198-acre Dunn ranch (674 F.2d at 1100).[3] It is clear from *Oliver* that this analysis is erroneous; a perimeter fence around an

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[3] Because the court laid no particular stress on the existence or nature of the second fence, presumably the court of appeals regards the entire 198 acres as "curtilage."

open area does not alter its status as an "open field" for Fourth Amendment purposes.

2. The court of appeals' decision in its present form marks a radical departure from settled legal principles. While there may be some uncertainty about the meaning of "curtilage" in other settings, this case represents the prototypical situation in which the doctrine evolved, for the boundaries of the curtilage here are "clearly marked" (*Oliver*, 466 U.S. at 182 n.12) by the fence surrounding the residence. Where a large ranch contains a residence surrounded by a fence, the area within such a fence is ordinarily considered "the area around the home to which the activity of home life extends" (*ibid.*); the rest of the ranch is not "associated with the 'sanctity of a man's home and the privacies of life' " (*id.* at 180, quoting *Boyd* v. *United States*, 116 U.S. 616, 630 (1886)) and therefore it is not part of the curtilage.

By applying the term "curtilage" to an area a considerable distance from a fence that *separates* it from the house, the court of appeals has cast the scope of the "open fields doctrine," recently clarified by this Court, into considerable confusion. For the law enforcement officer in the field, the situation is intolerable. He simply cannot predict with any confidence whether a privately-owned area that clearly appears to be an open field under this Court's recent decision in *Oliver* will ultimately be judged to be "curtilage" by the Fifth Circuit and therefore whether an entry into that field will be judged to be violative of the Fourth Amendment.[4]

---

[4] We note that whatever the merit of the court of appeals' radical new interpretation of the "curtilage," it is surely unreasonable, as a matter of exclusionary rule policy, to suppress the evidence seized in this case on the basis of that

3. Moreover, quite apart from the merits of the court of appeals' new decision, the process through which it was entered warrants this Court's attention. This is not a case in which the court of appeals simply rendered a decision that is clearly at odds with Supreme Court precedent. Rather, the court of appeals has reinstated a decision that had been vacated by an order of this Court because of an intervening decision. The court of appeals has taken this action without any explanation of why that decision is not controlling and in the face of its own prior recognition that "[t]he lessons of *Oliver* are clear as applied to [the curtilage] inquiry" (Pet. App. 6a). When a decision of a court of appeals is vacated by this Court, the integrity of the hierarchy of the judicial system is implicated by a decision simply reinstating that opinion with little or no explanation. See *Florida* v. *Rodriguez*, No. 83-1367 (Nov. 13, 1984); *Hutto* v. *Davis*, 454 U.S. 370, 374-375 (1982). This consideration may make it necessary for the Court to grant certiorari a second time in order to ensure that a lower court complies with the terms of a remand. See *Sumner* v. *Mata*, 455 U.S. 591, 597-598 (1982).

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interpretation. At the time the officers in this case entered respondent's ranch they could not conceivably have suspected that they were entering onto the curtilage. The purposes of the exclusionary rule are not served by invoking a new rule to suppress evidence seized by police officers acting in good faith in accord with the law in existence at the time. See *United States* v. *Johnson*, 457 U.S. 537, 549-550 (1982); cf. *United States* v. *Leon*, No. 82-1771 (July 5, 1984); *Michigan* v. *DiFillippo*, 443 U.S. 31 (1979).

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted.

CHARLES FRIED
Solicitor General

APRIL 1986

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-1200

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

versus

RONALD DALE DUNN, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Western District of Texas

(November 14, 1985)

ON SUGGESTION FOR REHEARING EN BANC

(Opinion July 16, 1985, 5th Cir. 1985, 766 F.2d 880)

Before WISDOM, POLITZ, and TATE, Circuit Judges.

PER CURIAM.

A member of this court having requested a poll on the suggestion for rehearing en banc, the order dated September 11, 1985 denying rehearing and rehearing en banc was suspended. The poll was taken and a majority of the judges in active service having voted against a rehearing en banc, the petition for rehearing with suggestion for rehearing en banc is DE-

NIED; further, the order denying the petition for panel rehearing is reinstated and said petition is herewith DENIED.

Before CLARK, Chief Judge, GEE, RUBIN, REAVLEY, POLITZ, RANDALL, TATE, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, and JONES, Circuit Judges *.

(Dissents filed December 9, 1985)

E. GRADY JOLLY, with whom THOMAS GIBBS GEE, W. EUGENE DAVIS, and EDITH H. JONES, Circuit Judges, join dissenting:

I respectfully dissent from the denial of the petition for rehearing *en banc*. First, I do not view the panel opinion as consistent with *Oliver v. United States*, 104 S.Ct. 1735 (1984). Second, I do not think the barn in this case is a structure entitled to fourth amendment protection. Third, even if we assume it is entitled to fourth amendment protection, there was no fourth amendment intrusion that taints the evidence because the contraband was discovered by looking into the open barn from the outside.[1] Fourth, I respectfully submit that the panel opinion is contrary to our precedent. *United States v. Williams*, 581 F.2d 451 (5th Cir. 1978). And, finally, the panel opinion unnecessarily creates a conflict with the Eleventh Circuit. *United States v. Long*, 674 F.2d 848 (11th Cir. 1982). For these reasons, I dissent.

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* Judge ROBERT M. HILL did not participate in the reconsideration of the suggestion for rehearing en banc.

[1] Even upon discovery of the contraband the agents did not enter the barn. Rather they simply used the information obtained by their unintrusive observation to procure a search warrant pursuant to which they entered the barn and seized the contraband the next day.

In this case DEA agents trailed codefendant Carpenter to defendant Dunn's Texas ranch, after Carpenter bought equipment typically used to manufacture illegal phenylacetone. The DEA agents crossed a number of fences on their way to the larger barn. At the larger barn, they walked around the back and sides, but they could not see in. They walked to the front of the larger barn, which was enclosed by a wooden fence. They scaled this fence, and approached the open front of the barn. The barn front was blocked by a waist-high wooden fence, and so the agents stopped and peered through mosquito netting into the barn with the aid of a flashlight. There they saw the illegal phenylacetone equipment. Thus, as I discuss later, *no fourth amendment intrusion ever occurred to bar the admission of the subject evidence.*

Nevertheless, on the basis of these facts the panel initially held, *United States v. Dunn*, 674 F.2d 1093 (5th Cir. 1982), that the defendants had an expectation of privacy with respect to the barn because it was within the curtilage of the residence, was not visible from the road, and was protected by perimeter and interior fences.

The Supreme Court granted certiorari, vacated the panel opinion, and remanded for reconsideration in the light of the Court's opinion in *Oliver v. United States*, 104 S. Ct. 1735 (1984).

Oliver held that *Katz v. United States*, 389 U.S. 347 (1967), with its emphasis on the reasonable expectation of privacy under the fourth amendment, did not impair the doctrine enunciated by Justice Holmes in *Hester v. United States*, 265 U.S. 57 (1924), that open fields do not enjoy fourth amendment protection. The Court noted that fences and no-trespassing signs do not effectively bar the public from viewing open

fields in rural areas. *The fact that the government agents may have committed a trespass at common law does not mean that the agents' intrusion upon an open field constitutes a "search" in the constitutional sense.* *Id.* at 1743. Nor does the right conferred by trespass law to exclude persons embody a privacy interest protected by the fourth amendment. *Id.* at 1744 n.15. Applied to this case, *Oliver* held *that the agents had the right to be where they were when they saw the contraband from outside the barn.*

On remand the panel held, upon reconsideration, that the barn was not within the constitutionally protected curtilage of the ranch house. Thus, the panel implicitly concedes that the barn is a structure in an open field. Yet, *Oliver* notwithstanding, the panel concluded that "the agents' action in crossing two fences alongside and around the barn, and going under the front overhang of the barn to a position immediately adjacent to an inset wall and, with the aid of a flashlight, peering through the barn's front fishnet covering to view its contents . . . violated the fourth amendment. . . ."

The panel distinguishes *Oliver* as follows:

> The effect of their circling the large barn, being unable to see inside through the back or sides, climbing a wooden fence at its front, entering its overhang and going into the immediate proximity of the fish net and wooden gate front enclosure, is not so informed by *Oliver*'s lead and nudge.

The panel's reasoning halts course in mid-air by concluding however, that the barn was not within the protected curtilage but rather (it must be assumed) in an unprotected open field. The panel thus effectively recognizes that *Oliver* precludes the general holding that a barn in an open field is protected, and

proceeds to adopt a different analysis and arrive at a novel holding: the barn in the open field is a commercial building:

> A barn is as much a part of a rancher's place of business as a warehouse or outbuilding is part of an urban merchant's place of business. It is and ought to be constitutionally protected from warrantless searches if the owner or occupier takes reasonable steps to effect privacy.

I find this holding to be flawed in at least three respects. First, the general purpose of a barn does not lend itself to the same rationale as a commercial building. Unlike a commercial building, a barn is not secure. It offers little privacy against those who would pass by. It houses animals, not "persons," "papers," and "effects." Its fences keep animals in, not people out. Persons in a barn have, or should have, little expectation of privacy.

Second, the proposition that an owner or occupier may base his constitutional right to privacy on subjective expectations is contrary to the principle reiterated in *Oliver*. The Court made clear that the fourth amendment does not protect the subjective expectation of privacy, but only "those expectations society is prepared to recognize as 'reasonable.'" The test of legitimacy of the search is not whether the individual chooses to conceal his private activity,

> rather the correct inquiry is whether the government's intrusion infringes upon the personal and societal values protected by the fourth amendment. As we have explained, we find no basis for concluding that a police inspection of open fields accomplishes such an infringement.

Oliver, 104 S. Ct. at 1743.

Third, the cases cited in *Dunn II* that purport to support the characterization of a barn as a commercial building, I respectfully suggest, are inapposite. None involves a structure on a farm. Furthermore the cases involve either intrusive searches into commercial buildings (there was no intrusion into the building here) or searches of effects (not apposite here) rather than a building.

Aside, however, from whether the defendant had a reasonable expectation of privacy in the *structure* that would prevent the officers from entry without a warrant, the fact remains that, because the officers were *not* on the curtilage and because the structure in question is conceded to be in an "open field," the officers had the right to be where they were: outside the barn. It was from this vantage point that they observed the contraband, and consequently the discovery of the contraband, later used to obtain a warant, was not a violation of the fourth amendment. Thus, in any event, the evidence suppressed by the panel is not unconstitutionally tainted even if the defendants had an expectation of privacy in the barn as a commercial building.

This conceptual difference of how the structure should have been treated, however, is not the only concern that I have with the panel's holding. The opinion conflicts with, and is contrary to our precedent. Our opinions have uniformly held that structures on a farm constitute either: part of the curtilage, entitled to fourth amendment protection; or, an open field structure, not entitled to fourth amendment protection.

In *United States v. Williams*, 581 F.2d at 451, a case I find very difficult to distinguish from the facts in this case, the court (Gee, J.) held that agents who

trespassed through the open fields of the defendant, trespassed the defendant's curtilage, and detected the odor of contraband emanating from a shed, next to which they were standing, did not violate the defendant's fourth amendment rights. We held that there was no violation notwithstanding that the shed was on the curtilage and the agents trespassed the curtilage before detecting the odor.

Here, the government agents trespassed through open fields, but never trespassed on the curtilage. They approached a farm building where, while standing on the outside of the building, they observed the contraband. *Williams*, it seems to me, controls: there was no fourth amendment violation. Indeed, the defendant in *Williams* makes a stronger case for fourth amendment violation than does the defendant here because the contraband (1) was detected there as a result of the trespass on the curtilage and (2) was in a shed clearly protected by the fourth amendment as part of the curtilage.

Moreover, the panel opinion, in overruling our precedent, creates a conflict with our sister circuit. In *United States v. Long*, 674 F.2d at 848, the government agents trespassed open fields, approached a barn in an open field, and looked through its open doors to observe the contraband. The Eleventh Circuit, relying on Fifth Circuit law, stated:

> The former Fifth Circuit has held that there is no legitimate expectation of privacy in outbuildings and open fields, even if fenced, unless they are part of the curtilage, or the immediate appurtenances of a home. *United States v. Williams*, 581 F.2d 451, 453-54 (5th Cir. 1978), *cert. denied*, 440 U.S. 972, 99 S. Ct. 1537, 59 L.Ed.2d 789 (1979); *United States v. Brown*,

473 F.2d 952 (5th Cir. 1973); *Hodges v. United States*, 243 F.2d 281, 283 (5th Cir. 1957).

Long, 674 F.2d at 853. It therefore appears clear to me that the panel opinion has the effect of overruling prior precedent.

Finally, as a practical matter, I dissent from the denial of rehearing en banc because many drug operations use farms and farm structures, and this opinion introduces a new rule obstructing the government in its battle with drug offenders. Apparently, government agents cannot now look into open farm structures without a warrant, a protection even *greater* than that usually afforded to true commercial buildings. Such a departure from precedent, introducing a new rule expanding fourth amendment protection that will have significant impact on law enforcement, should, for its practical effects, be considered enbancworthy. I therefore respectfully dissent from this court's decision to deny rehearing en banc.

GEE, Circuit Judge, Dissenting:

I join wholeheartedly in Judge Jolly's dissent, adding only a word to emphasize the concerns expressed in his concluding paragraph. It has been observed in a slightly different context that judges read the newspapers. Doing so, I have noted more than one recent item recounting drug purveyor's boasts that by the use of concealed greenhouses and similar isolated structures they are increasingly able to evade the efforts of lawful authority to control their traffic in poison. The unfortunate and unintended effect of the panel opinion will be to abet this trend. Isolate, fence, and camouflage your greenhouse, we say, and —curtilage or no curtilage—the Fourth Amendment protects it. 766 F.2d 880.

A more unfortunate result, in real-world terms, can scarcely be imagined. Were that result compelled by an iron logic or by relevant Supreme Court authority, we would be bound to reach it regardless of consequences. Judge Jolly's dissent shows that neither is the case.

APPENDIX G

(Filed December 16, 1985)

PATRICK E. HIGGINBOTHAM, Circuit Judge, with whom THOMAS M. REAVLEY, Circuit Judge, joins dissenting:

I join Judge Jolly's dissent insofar as it urges that the barn was not "searched" within the meaning of the fourth amendment. The barn was in an open field, and the officers did not transgress the Constitution when they walked up to it. The panel, despite its denial, has created a curtilage around a barn in an open field. That is inconsistent with the teaching of *Oliver v. United States*, 104 S.Ct. 1735 (1984).

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-1200

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

versus

RONALD DALE DUNN, DEFENDANT-APPELLANT

[Filed Jan. 17, 1986]

Appeal from the United States District Court for the Western District of Texas

---

Before WISDOM, POLITZ, and TATE, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the judgment of this Court entered on July 16, 1985 and issued as mandate on November 26, 1985 is recalled and vacated. The Court will enter a new judgment in this cause in due course.

APPENDIX I

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 81-1200

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

versus

RONALD DALE DUNN, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Western District of Texas

(February 4, 1986)

Before WISDOM, POLITZ, and TATE, Circuit Judges.

PER CURIAM:

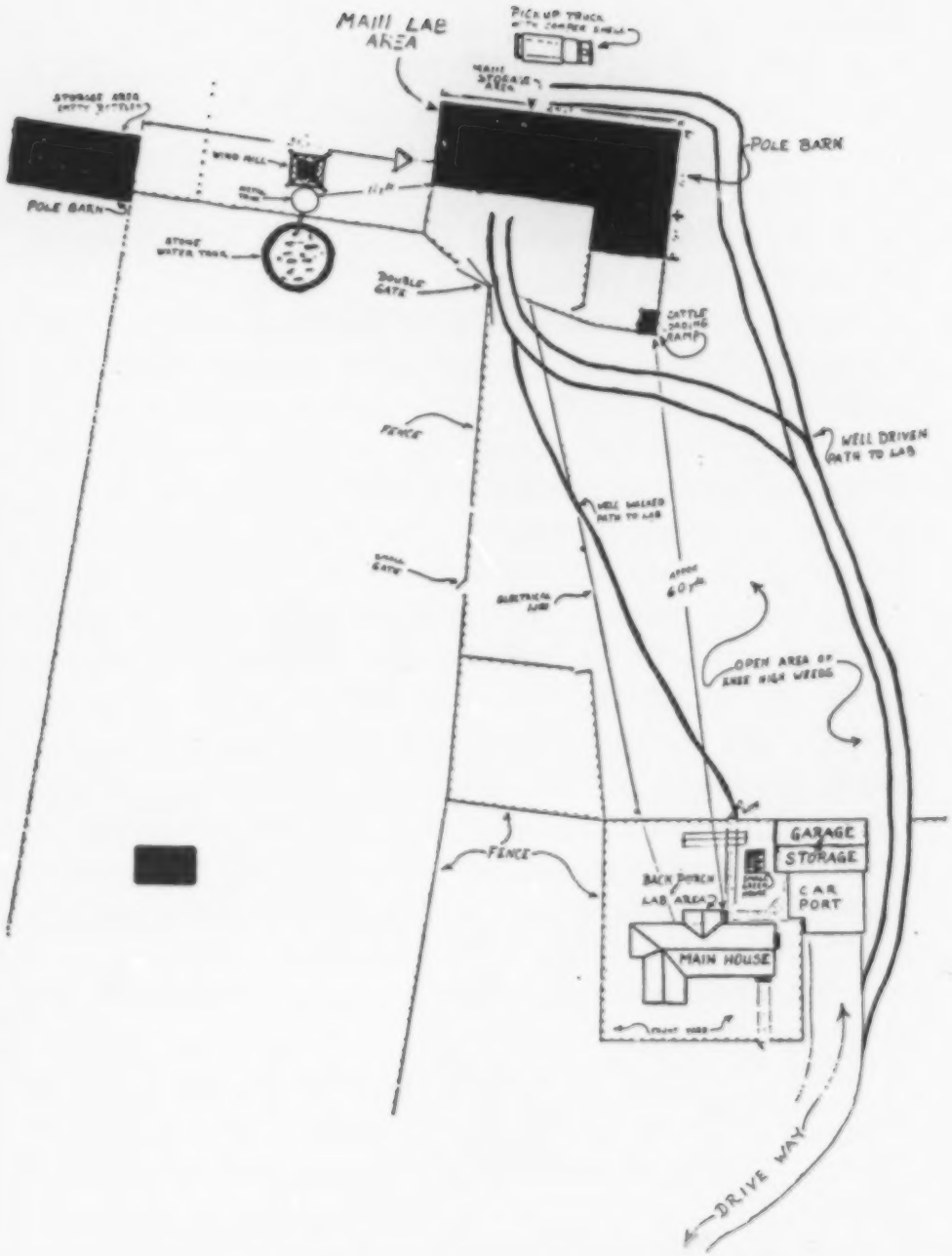
Upon first consideration of this appeal we reversed the convictions of Ronald Dale Dunn finding, *inter alia*, that a barn which was the subject of a warrantless search was within the protected curtilage of the Dunn ranch house. *United States v. Dunn*, 674 F.2d 1093 (5th Cir. 1982). The Supreme Court granted the government's petition for writ of certiorari, *United States v. Dunn*, 467 U.S. 1201, 104 S.Ct.

2380, 81 L.Ed.2d 340 (1984), and vacated our disposition of Dunn's appeal, remanding "for further consideration in light of *Oliver v. United States*," 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984). On remand we held that the barn in question was not within the curtilage, *United States v. Dunn*, 766 F.2d 880 (5th Cir. 1985). By an Order dated January 17, 1986, we vacated that opinion and returned the matter to the panel.

Upon further collegial consideration of the mandate of the Supreme Court in the course of the disposition of the government's petition for rehearing with suggestion for rehearing en banc, we have determined that the holding and teachings of *Oliver v. United States* neither direct nor require that the subject barn be found to be outside the curtilage of the Dunn ranch house. We again have examined painstakingly the facts reflected in this record, as set forth in detail in our two prior panel opinions, against the backdrop of *Oliver v. United States* and other decisions of the Supreme Court and of this court. To reflect the relative positions of the buildings and improvements, we attach a site plat of the ranch house enclave which was filed in evidence as a government exhibit. Upon studied reflection, we now conclude and hold that the barn was inside the protected curtilage.

Accordingly, we reinstate the opinion rendered on May 7, 1982, reported at 674 F.2d 1093 (5th Cir. 1982), as our disposition of this appeal by Ronald Dale Dunn.

PRIOR OPINION REINSTATED.



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APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-1200

D. C. Docket No. A-80-CR-89

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

versus

RONALD DALE DUNN, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Western District of Texas

---

Before WISDOM, POLITZ, and TATE, Circuit Judges.

JUDGMENT

Upon further consideration of the mandate of the Supreme Court following the vacation of the opinion of this Court of July 16, 1985 rendered following the Supreme Court's mandate, IT IS ORDERED AND ADJUDGED by this Court that the prior opinion of this Court rendered on May 7, 1982, is reinstated; and the judgment of conviction of Ronald Dale Dunn in this cause is reversed, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of May 7, 1982.

February 4, 1986

Issued as Mandate:

☆ U. S. GOVERNMENT PRINTING OFFICE: 1985 491507 20099

EDITOR'S NOTE

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Supreme Court, U.S.
FILED
MAY 22 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-998 (8)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

V.

RONALD DALE DUNN

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO GOVERNMENT'S SUPPLEMENT

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ATTORNEY FOR RESPONDENT

App

QUESTION PRESENTED

Where a barn is located in a clearing surrounded by woods on a 198-acre ranch circled by a perimeter fence; ranch house and buildings are located at the end of a private drive approximately one-half mile from public road; entrance to private road secured by locked chain; barn was not visible from the public road or perimeter fence; contents of barn could not be seen from air or ground unless barn approached by one penetrating encircling fence, walked under its overhang, stood next to fishnet front covering; and entry could be made only by force or hurdling wooden gates which were locked; is this intrusion by officers a violation of the rights guaranteed by the Fourth Amendment?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

NO. 85-998

UNITED STATES OF AMERICA, PETITIONER

V.

RONALD DALE DUNN

RESPONDENT'S BRIEF IN OPPOSITION
TO GOVERNMENT'S SUPPLEMENT

OPINIONS BELOW

The opinion of the Court of Appeals on remand from this Court is reported at 755 F.2d 880. The original opinion of the Court of Appeals is reported at 674 F.2d 1093.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

STATEMENT OF THE CASE

After trespassing upon the ranch owned by Ronald Dale Dunn and conducting a visual and systematic search of the barns, garage, house and carport areas of the ranch, officers came to the barn where they smelled an odor which was not contraband. They tried a door to the barn and found it locked. They crossed another fence and at that point they were right underneath the

overhang of the barn where a gate led further into the barn. They tried this gate and found it locked and shut. Above this gate was a netting which hung from the ceiling to the gate. They stood right at the gate and began their search with the aid of flashlights. R-4-80.

The officers looked into the carport and then tried to enter the garage by trying the windows and the doors and everything was locked up. These trespassing officers searched only buildings on the property. R-4-83.

ARGUMENT

The government's crafty way of adding facts to its conclusory statements cannot convert the issue in this case to one meriting review.

This case was properly decided by the Court of Appeals who, following the mandate of this Court, went through studied consideration of the holding in Oliver v. United States 466 U.S. 170, re-examined the facts against the backdrop of Oliver and other decisions of the United States Supreme Court. After this time-consuming study the Court of Appeals determined that "the holding and teachings of Oliver v. United States neither direct nor require the subject barn to be outside the curtilage of the house". (App. 1 Respondent's Brief) This decision is manifestly correct.

The government does not challenge the holding of the Court of Appeals which stated Oliver does not require the barn to be outside the curtilage. The government further does not attempt to show how Oliver applies to

this case. It falls back upon the "open fields doctrine" which was defined in Oliver v. United States as follows:

> "It is clear, however, that the term "open fields" may include any unoccupied or undeveloped area outside of the curtilage. As open field need be neither "open" nor a "field" as those terms are used in common speech. For example, a thickly wooded area nonetheless may be an open field as that term is used in construing the Fourth Amendment."

This definition does not include the barn searched by officers without a warrant in this case. The trails of the government's rhetoric in its attempt to seek review extend to allegations requiring prediction by law enforcement officers. This Court has addressed that issue in Johnson v. United States 333 U.S. 10, 13-14 (1947):

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. * * * When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent."

The tireless work of the Court of Appeals in complying with the mandate of this Court has been subjected to the government's attempt to discredit these efforts. The Hutto v. Davis, 454 U. S. 370, (1982) and Florida v. Rodriguez, 469 U.S. _____, 83 L Ed.2d. 165 are not comparable. In these cases no reasons were given for the action taken by the Court on remand. In this case,

the Court of Appeals has given consideration to this Court's mandate and has given its reason for reinstating its original opinion. Thus, the government's attempts to demean the efforts of the Court of Appeals appear trite.

The government obviously is not aware that farms and ranches have fences around the house separating it from the barns to keep the farm animals out of the yard. The barn is still a vital part of the ranch or farm, and is most assuredly associated with the home and family life. The distance from the house to the barn is not a considerable distance from the house as the government would like to have one believe, but a very short distance by all other standards. Further, there is no access to the ranch by the public as the ranch buildings are one-half mile from the public road. In fact, the Court in Oliver expressly holds:

> "In this light, the rule of Hester v. United States, supra, that we re-affirm today, may be understood as providing that an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home. See also Air Pollution Variance Bd. v. Western Alfalfa Corp., 416 U.S. 861, 865, 40 L Ed 2d 607, 94 S Ct 2114 (1974). This rule is true to the conception of the right to privacy embodied in the Fourth Amendment. The Amendment reflects the recognition of the Founders that certain enclaves should be free from arbitrary government interference." (Emphasis added)

Therefore the government seeks to disregard this Court's express affirmation that curtilage is protected.

CONCLUSION

For the above reasons, Respondent respectfully requests

that the petition for writ of certiorari be denied.

Respectfully submitted,

LOUIS DUGAS, JR., P.L.C.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

NO. 85-998

UNITED STATES OF AMERICA, PETITIONER

V.

RONALD DALE DUNN

CERTIFICATE OF SERVICE

LOUIS DUGAS, JR., hereby certifies that he is a member of the bar of the Supreme Court of the United States and counsel for RONALD DALE DUNN, Respondent, in the above matter; and that a true and correct copy of the above and foregoing Brief in Opposition has been mailed to the attorney for the Petitioner, the Honorable Charles Fried, Solicitor General of the United States of America, by mail, postage prepaid, on this the 22nd day of May, 1986.

LOUIS DUGAS, JR.

Supreme Court, U.S.
FILED
AUG 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-998

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

v.

RONALD DALE DUNN

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI
FILED DECEMBER 10, 1985
CERTIORARI GRANTED JUNE 23, 1986

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-1200

UNITED STATES OF AMERICA, APPELLEE

v.

RONALD DALE DUNN, APPELLANT

RELEVANT DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS
5/7/81	Appeal docketed.
3/17/82	Argued and submitted.
5/7/82	Opinion rendered; reversed and remanded.
6/28/82	Order denying rehearing.
9/29/82	Notice of filing of certiorari petition on 9/22/82.
5/23/84	Judgment of Supreme Court remanding to court of appeals.
7/16/85	Opinion on remand from U.S. Supreme Court. Reversed. Portions of original opinion reinstated.
9/11/85	Order denying suggestion for rehearing en banc.
11/14/85	Order denying rehearing with suggestion for rehearing en banc; Further, the order denying the petition for panel rehearing is reinstated and said petition is denied. (w/poll—the order dated 9/11/85 denying rehearing and rehearing en banc was suspended).
11/26/85	Judgment as mandate issued to clerk.

DATE	FILINGS–PROCEEDINGS
12/9/85	Dissents of Judges Jolly (with whom Judges Davis and Jones join) and Judge Gee to denial of suggestion for rehearing en banc filed on 11/14/85.
12/16/85	Dissent to denial of suggestion for rehearing en banc by Judge Higginbotham, joined by Judge Reavley.
12/23/85	Notice of filing certiorari in Supreme Court on 12/10/85.
1/17/86	Order that the judgment of this Court entered on 7/16/85 and issued as mandate on 11/26/85 is recalled and vacated. The Court will enter a new judgment in this cause in due course.
2/4/86	Opinion reinstating opinion of May 7, 1982. Reversed and remanded.
2/26/86	Judgment as mandate issued to clerk.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

Cr-80-00089-01

UNITED STATES OF AMERICA

v.

RONALD DALE DUNN

Judge: Judge Nowlin Case Filed: 12/5/80

DATE	FILINGS–PROCEEDINGS
11/10/80	Filed magistrate complaint (Dkt'd 11/24/80).
	Arrest warrant issued. (Dkt'd 11/24/80).
	Defendant arrested (Dkt'd 11/24/80).
	Defendant's first appearance (Dkt'd 11/24/80).
12/5/80	Filed indictment (Dkt'd 12/9/80).
12/15/80	Waiver of personal appearance at arraignment and entry of plea not guilty (Dkt'd 12/15/80).
	Defendant appears with counsel (Dkt'd 12/15/80).
1/5/81	Motion to suppress evidence filed (MOT #11) (Counts 1-4) (Evidence Seized in Blanco County) (Dkt'd 1/8/81).
2/13/81	Hearing on pre-trial motions held 2/13/81 (Counts 1-4) (Dkt'd 2/18/81).
	Motion to suppress evidence denied (MOT #11) (Evidence seized in Blanco County) (Dkt'd 2/18/81).
3/2/81	Voir dire begins–jury (Counts 1-4) (JUDGE HILL) (Dkt'd 3/11/81).
	Jury impaneled (Counts 1-4) (Dkt'd 3/11/81).
	Trial begins–jury (Counts 1-4) (JUDGE HILL) (Dkt'd 3/11/81).

DATE	FILINGS – PROCEEDINGS
3/3/81-3/6/81	Trial held – jury (JUDGE HILL) (Dkt'd 3/11/81).
3/6/81	Jury verdict of guilty (Counts 1-4) (Dkt'd 3/11/81).
4/24/81	Sentencing of defendant (Counts 1-4) (JUDGE HILL) (Dkt'd 4/30/81).
5/5/81	Notice of appeal (Dkt'd 5/5/81).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Criminal No. A80CR89

INDICTMENT

[Vio: 21 U.S.C. § 846—Conspiracy to Manufacture a Schedule II Controlled Substance; 21 U.S.C. § 841(a)(1)—Manufacturing a Schedule II Controlled Substance; 18 U.S.C. § 2—Aiding and Abetting; 21 U.S.C. § 841(a)(1)—Possession with Intent to Distribute a Schedule II Controlled Substance]

UNITED STATES OF AMERICA, PLAINTIFF

v.

RONALD DALE DUNN AND ROBERT LYLE CARPENTER, DEFENDANTS

THE GRAND JURY CHARGES

COUNT ONE
[21 U.S.C. § 846]

That beginning on or about July 23, 1980, and continuing until on or about November 8, 1980, in the Western District of Texas, and elsewhere, Defendants

RONALD DALE DUNN

AND

ROBERT LYLE CARPENTER

unlawfully, willfully and knowingly did combine, conspire, confederate and agree together and with each other to commit the following offenses:

(1) to unlawfully, knowingly, and intentionally manufacture phenylacetone, a Schedule II Controlled

Substance, contrary to Title 21, United States Code, Section 841(a)(1);

(2) to unlawfully, knowingly, and intentionally manufacture amphetamine, a Schedule II Controlled Substance, contrary to Title 21, United States Code, Section 841(a)(1); and

(3) to unlawfully, knowingly, and intentionally possess amphetamine, a Schedule II Controlled Substance, with intent to distribute the same, contrary to Title 21, United States Code, Section 841(a)(1), all in violation of Title 21, United States Code, Section 846.

COUNT TWO
[21 U.S.C. § 841(a)(1)]

1. Between on or about July 23, 1980, and on or about November 8, 1980, in the Western District of Texas, Defendant

RONALD DALE DUNN

unlawfully, knowingly, and intentionally did manufacture phenylacetone, a Schedule II Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1).

2. That Defendant ROBERT LYLE CARPENTER aided, abetted, counseled, induced, and procured the commission of the offense alleged above, in violation of Title 18, United States Code, Section 2.

COUNT THREE
[21 U.S.C. § 841(a)(1)]

1. Between on or about July 23, 1980, and on or about November 8, 1980, in the Western District of Texas, Defendant

RONALD DALE DUNN

unlawfully, knowingly, and intentionally did manufacture amphetamine, a Schedule II Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1).

2. That Defendant ROBERT LYLE CARPENTER aided, abetted, counseled, induced, and procured the commission of the offense alleged above, in violation of Title 18, United States Code, Section 2.

COUNT FOUR
[21 U.S.C. § 841(a)(1)]

1. On or above November 8, 1980, in the Western District of Texas, Defendant

RONALD DALE DUNN

unlawfully, knowingly, and intentionally did possess with intent to distribute approximately 9.3 pounds of amphetamine, a Schedule II Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1).

2. That Defendant ROBERT LYLE CARPENTER aided, abetted, counseled, induced, and procured the commission of the offense alleged above, in violation of Title 18, United States Code, Section 2.

A TRUE BILL:

[sig illegible]
Foreman

JAMIE C. BOYD
United States Attorney

By: /s/ JACK C. O'DONNELL
Jack C. O'Donnell
Assistant United States Attorney

TRANSCRIPT OF PROCEEDINGS

Suppression Hearing
February 13, 1981

[67] THE COURT: There is no reason to sever it unless you need to, Mr. O'Donnell.

MR. O'DONNELL: Your Honor, it might be better to keep them separate, to tell you the truth. I think it might be less confusing.

MR. GERSON: Either way is fine with us, Your Honor.

THE COURT: All right. You may proceed. Let's go with the Motion to Suppress, not the confession but the matter of suppressing evidence on the ranch.

MR. O'DONNELL: The United States calls Special Agent Ron Gospodarek.

Excuse me, Your Honor. I've got the wrong witness. I need Mr. Green first to identify the charts.

THE COURT: Mr. Newlin may be willing to stipulate, I don't know.

MR. NEWLIN: I think we can stipulate to it, Your Honor. Mr. Green is going to testify—if I can have this agreement—that this was in fact an area that he stepped off and it's a reasonably accurate portrayal of the building and surrounding area of the ranch property at Blanco, Texas.

MR. O'DONNELL: Your Honor, what I don't like about the stipulation is "reasonably accurate." [68] If he'll stipulate that these are accurate drawings of the barn, that Government's Exhibit 14 is an accurate drawing of the barn where the lab was and that Government's Exhibit 13 is an accurate drawing of the house and the surrounding buildings, then we don't need Mr. Green.

MR. NEWLIN: For the purposes of this hearing we will so stipulate, Your Honor.

THE COURT: All right. Then call your next witness.

MR. O'DONNELL: Then in that event I will call Special Agent Ron Gospodarek.

THE COURT: Will you state your full name, please, sir, and spell your last name?

THE WITNESS: Ronald Gospodarek, G-o-s-p-o-d-a-r-e-k.

THE COURT: All right. You may proceed.

RONALD GOSPODAREK,

called as a witness by the plaintiff, and having been duly sworn by the clerk, assumed the stand and testified as follows:

DIRECT EXAMINATION

BY MR. O'DONNELL:

Q. How are you employed, sir?

A. Special Agent for the Drug Enforcement Administration.

Q. How long have you been so employed?

[69] A. Approximately 10½ years.

Q. And you're stationed in Houston now?

A. Yes, sir.

Q. Where have you been stationed other times?

A. Minneapolis, Minnesota.

Q. What is your experience in connection with investigation of illegal, clandestine laboratories?

A. I'm the team leader in charge of a group of individuals who pursues these types of investigations.

Q. How many such type investigations have you worked on?

A. Over 50.

Q. Does that include the actual seizure of an illicit laboratory?

A. Yes, it does.

Q. In connection with your experience in these matters have you had occasions to—Well, tell me your background as far as your knowledge of precursor chemicals, smells of contraband chemicals.

A. I have a Bachelor of Science degree in chemistry, particularly with emphasis on organic chemistry.

Q. Have you had experience and training in what chemicals are precursor chemicals to the controlled substances amphetamine and methamphetamine?

A. Oh, yes, we've had extensive training by our chemists and by book knowledge, et cetera, into what chemicals are made [70] up to make certain types of illicit drugs, including methamphetamine and amphetamine.

Q. And have you on numerous occasions seized amphetamine?

A. Yes, I have.

Q. What about phenylacetone? What is that?

A. Currently it's a Schedule II controlled substance. At the previous time it was a major precursor involved in the manufacture of methamphetamine and amphetamine.

Q. In your experience and training have you had occasion to see phenylacetone being manufactured?

A. Yes.

Q. Have you had occasion to smell phenylacetone while it was being manufactured?

A. Yes, I have.

Q. On numerous occasions?

A. On several. This is somewhat of a new law for us and something we've just gotten into, but on several occasions.

Q. All right, Special Agent Gospodarek, I want to direct your attention to November 5, 1980. Were you assigned to a particular case on that date?

A. Yes, I was.

Q. What case were you working on?

A. I was working on the Carpenter investigation.

Q. Is that the case we're here in court on today?

A. Yes, it is.

[71] Q. Mr. Dunn and Mr. Carpenter?

A. Yes, sir.

Q. Where were you on November 5th, 1980?

A. In the morning I was in Houston, Texas, and by mid-afternoon I was in Johnson City, Texas, outside of it.

Q. Where is Johnson City, Texas?

A. It's somewhere west of Austin.

Q. What county is that in?

A. I don't believe I know.

Q. What were you doing after you got to Johnson City?

A. I was on surveillance of a vehicle that we had followed from Houston.

Q. Where did you follow the vehicle to?

A. To what I considered to be a ranch site somewhere outside Johnson City. I believed the county is Blanco.

Q. What was followed to this particular ranch, now?

A. A truck.

Q. Could you describe to the Court—First of all, did you do any research as to the ownership of this particular ranch?

A. I was involved with a group of people on the following day that discussed with the game warden who actually found the ownership of the property.

Q. Where did the game warden determine the ownership of the property?

[72] A. From the county records.

Q. Did he tell you who owned the ranch?

A. Yes.

Q. Who was that?

A. Mr. Dunn.

Q. Could you describe to the Court the general physical description of this ranch in Blanco County?

A. At that time we did not have any idea as to the physical boundaries of the ranch itself, only of the approximate acreage, which was approximately 198 acres.

Q. Did you have occasion to make some aerial photographs of the ranch?

A. Yes, I did.

Q. When did you do those?

A. I believe that was on the afternoon of the 5th.

Q. Was that a DEA airplane?

A. Yes.

Q. Did you take the photographs?

A. Yes, I did.

Q. From your aerial view of the ranch could you basically describe to the Court what we're talking about? Is this an isolated ranch up in the Hill Country?

A. Yes, it is.

Q. Is there a home on the ranch?

A. Yes, there is.

[73] Q. What other buildings are on the ranch?

A. Well, there's a pole barn and then another type of barn and a water tank and a windmill, a garage and a small house adjacent to the actual farm house.

Q. Now, I want to direct your attention to November 5, 1980, in the evening hours. Did you have occasion to go upon Mr. Dunn's land and approach the barn?

A. Yes.

Q. Approximately what time did you start this expedition of yours?

A. It was fairly late in the evening.

Q. Approximately what time?

A. Probably around 10:00 o'clock or so.

Q. It was dark?

A. Very dark.

Q. Was someone with you?

A. Yes.

Q. Who was with you?

A. Officer Martin Fite.

MR. O'DONNELL: May I approach the witness, Your Honor?

THE COURT: Yes, you may.

Q. Special Agent Gospodarek, I'm going to hand you what's been marked as Government's Exhibit No. 1 and ask you sir, if you can identify that?

[74] A. Yes, I can.

Q. What is Government's Exhibit 1?

A. That's one of the aerial photographs that I took of the area of the farm house that we saw the chemicals go into.

Q. Is that Mr. Dunn's house? Is his house depicted in the photograph?

A. Yes, it is.

Q. Is the barn where the lab was found depicted in the photograph?

A. Yes, it is.

Q. Now, prior to coming to court did I ask you to trace with a black pen the route that you took to approach the barn on November 5th?

A. Yes, you did.

Q. Have you done that on the photograph?

A. Yes, I have, in black pencil.

Q. Now, describe to the court the route that you took and the markings on the photograph.

A. The route that I took was an attempt to come into the rear of the ranch toward the back by the barns, and what in essence happened was we got lost and found an open field which I believed to be on the north side of the home—or what we thought at that time was the north side of the home—and we followed this open field to where we ran into the road that ran in front of the house. At that point we just decided [75] to follow the road to try and find the entrance to the ranch, which we had identified in the daytime, which we subsequently did, and we walked a ways down toward a house which is near the entrance to

Mr. Dunn's property but does not belong to Mr. Dunn, to my knowledge, and crossed up into the trees and went in what we felt was the direction the driveway ran back toward the residence.

Q. Have you marked on the photograph in black ink the route that you've just described?

A. Yes, I have.

Q. Now, part of the route you've just described would not be on this picture, is that correct?

A. Correct.

Q. The picture wouldn't include how far out you went?

A. Correct.

MR. O'DONNELL: Your Honor, at this point I would offer into evidence Government's Exhibit No. 1.

THE COURT: I'll allow cross examination.

MR. O'DONNELL: May I approach the witness, Your Honor?

THE COURT: Yes, you may.

Q. (By Mr. O'Donnell): Special Agent Gospodarek, I'm going to hand you what's been marked as Government's Exhibit No. 2 and ask you if you can identify this photograph?

A. Yes, I can.

[76] Q. What is this photograph?

A. This is also the photograph of the ranch area but it particularly concentrates its emphasis upon the two barns and the house, and the route is marked on here which we took on November 5th.

Q. The house and the garage would be in the structure that's at the top of the photograph in Government's Exhibit 2?

A. Yes.

Q. And the barn where the lab was would be at the lower part of the photograph?

A. Yes.

Q. Have you marked with black ink, have you put an "X" on this photograph?

A. Yes, I have.

Q. What is the significance of that "X' on the photograph?

A. This is the approximate area where we first detected a smell emanating from the laboratory.

Q. Tell the Court what happened. First of all, what did you smell?

A. Well, I smelled a very strong odor of what I considered to be phenylacetic acid.

Q. How did you know it was phenylacetic acid?

A. Well, I've smelled phenylacetic acid many times before.

Q. What was the significance to you of smelling that?

[77] A. Well, phenylacetic acid is one of the essential precursors in the method that Mr. Dunn or the chemist in this case was going to be using to make phenylacetone.

Q. And phenylacetone is a controlled substance?

A. Yes.

Q. In Government's Exhibit 2, did I ask you to draw a line from the "X" as to where you went after you smelled the odor you've just decribed?

A. Yes.

Q. Have you done so?

A. Yes, I did.

MR. O'DONNELL: Your Honor, again, I would offer Government's Exhibit 2.

THE COURT: I'll defer until we have cross examination.

Q. (By Mr. O'Donnell): Special Agent Gospodarek, I want to direct your attention now to Government's Exhibit No. 13. Can you see that, sir?

A. Yes, sir.

Q. Do you recognize that to be the Dunn ranch and the barn where the lab was?

A. Yes, sir.

MR. O'DONNELL: Your Honor, I would offer into evidence Government's Exhibit 13, which was by the stipulation.

[78] THE COURT: G-13 is admitted for the purpose of this hearing.

MR. GERSON: No objection.

(The exhibit marked "G-13" was received in evidence.)

MR. O'DONNELL: Your Honor, do you wish the witness to step down?

THE COURT: He may; as long as you can hear what he says.

MR. O'DONNELL: All right. I'd like for you to take this pointer and point out to the Court where you were basically when you first smelled the odor you've described.

THE WITNESS: Well, the first time was in this area out here, which is not on this particular chart.

Q. The specific spot would be depicted on Government's Exhibit No. 2 where you've marked as "X"?

A. Yes, that's when we began smelling it, yes.

Q. Now, after you smelled that odor, state for the Court where you went and what you did.

A. After we first smelled the odor, we had caught a glimpse of the first barn and we made our way to the first barn, which is an open barn, and at that point there was nothing in there but empty boxes. From that point, then, we moved, homed in on the direction that we assumed the smell was coming from, which was the next outbuilding, which was the [79] big barn, and we did so by coming along this area here, secreting ourselves behind this tank for a period of time, and eventually working ourselves up to the corner of this barn here.

Q. State specifically how you got to the corner of the barn. Did you cross this fence?

A. Yes, I believe we had to cross this fence here. We went this route, and we went right up into this area right here.

Q. What did you do then?

A. At that point I could hear a motor running, like a pump motor of some sort, and we found a door over here. There is a door on this side which was locked or nailed shut, boarded shut, and at this point we started to go around to the rear when we observed this pickup camper which was disabled in the rear. We spent a considerable length of time here trying to determine if there was someone in that camper or not. Eventually we went around to this side of the building and determined that there was nothing to see on this side. I believe this is open in here eventually. Along the edge here under this, kind of like a brick, and there is a small crack between the brick and the tin as it comes down, and the odor was extremely strong coming from inside this corner of the building.

Q. The odor that you've previously described?

[80] A. Yes, the same odor, the phenylacetic acid smell.

Q. All right, sir. Go ahead.

A. We came back around, we crossed a small wooden type fence here, which put us right underneath a type of a tin overhang and in front of us was a wooden locked gate, a long gate. If it swung open it would be the length of the judge's desk, or maybe a little longer.

Q. Where was that, now?

A. That was right here.

Q. How high was that gate?

A. It probably came up to my waist, estimated.

Q. Was that gate open or shut?

A. It was shut and it was locked.

Q. Was there anything above that gate?

A. Yes, there was.

Q. What was that?

A. A fish netting, kind of a netting, that was hanging from the ceiling down to the gate.

Q. Did you cross over that gate and go into the barn?

A. No.

Q. Did you stand outside the gate?

A. We stood right at the gate.

Q. What did you do?

A. Well, we had flashlights with us and the smell was very, very strong at this point. We could hear the motor [81] running very loudly. I had a flashlight and we tried to get ourselves in the pòsition to block the house because the house was behind us. The house was dark but we didn't know if there was anyone home or if they were asleep.

MR. NEWLIN: Your Honor, I'm going to object to this type of answer. He was asked what he did. He still hasn't got to that point. I think it's clearly non-responsive.

THE COURT: You may proceed. What did you do?

THE WITNESS: At that point I turned my flashlight on and I observed three chemical—what I would call reflux setups, operating in the corner of the lab, along with numerous bottles and cans and boxes that I could recognize as containing chemical items. A complete chemistry lab is what it was.

Q. (By Mr. O'Donnell): Tell the Court what—You mentioned the word "reflux"?

A. Yes.

Q. What are you speaking of?

A. Well, he had several large, for simplification, pots, and in these pots was material that was under a constant temperature. Reflux is a situation where, in chemistry, is how we cook things. And it's hooked up so that it cooks but yet it has a condenser on it but water is running through it to keep the vapors cool and keep the actual reactor from [82] escaping. And it was this type of chemical process that was in process when I was at the laboratory.

Q. In your opinion was this a laboratory you were looking at?

A. I was looking at a phenylacetone laboratory in my estimation.

Q. Could you smell any smell?

A. Yes, I could smell phenylacetic acid, which is a dominant smell in this type of a situation.

Q. What did you and police officer Fite do then?

A. Well, we then crossed back across, around in the back.

Q. Let's be particular. Start with where you came out and where you went.

A. Well, we went back around the side of the building. We had been out in this area in direct view of the home. We went behind, crossed behind the camper. We had already determined there was no one in the camper.

Q. Excuse me, Special Agent Gospodarek. Let me ask you specifically, when you came out from this area where you were looking into the laboratory where did you specifically go?

A. To the best of my recollection we went back out around the edge of the way we came.

Q. You crossed over this fence?

A. Yes, the same fence.

[83] Q. All right. Go ahead, sir.

A. Then we went around behind the building, all the way around, came up on this side, walked along the edge of the building, eventually made ourselves back down into the trees and down to the edge of the garage.

Q. Down to this area?

A. Yes.

Q. What did you do down in this area?

A. At this point we got another smell toward the rear of the garage. We looked in the carport, which was an open carport, to see if there were any vehicles. There were none. We attempted to see if there were any vehicles in the garage but all the windows and the doors, everything was locked up.

Q. Did you cross the fence over into the yard of the house?

A. No, we didn't need to go into the house. We got back to here. We felt we were close enough, and we made our withdrawal.

Q. How did you withdraw?

A. We withdrew into the woods and down the road.

Q. Which direction? This direction?

A. Yes, back into the woods and down the road.

THE COURT: Is this a convenient time for recess, counsel?

MR. O'DONNELL: Yes, sir.

[84] THE COURT: It's 3:15, counsel. We'll be in recess until 25 after 3:00.

(Recess from 3:15 to 3:25 P.M.)

THE COURT: You may proceed.

MR. O'DONNELL: May I approach the witness, Your Honor?.

THE COURT: You may.

Q. (By Mr. O'Donnell): Special Agent Gospodarek, I want to hand you again Government's Exhibit 1 and again direct your attention back to November 5th. I ask you in black ink to trace your route. In the left corner, in the left bottom corner of the photograph, Government's Exhibit No. 1, you've got two little marks that look like an eleven. What is that?

A. That signifies we walked that to the road, and those two marks signify the road.

Q. That would be the road, the public road in front of the entrance to the ranch?

A. Yes, sir.

THE COURT: The public road on that photograph, G-1, is not shown on G-18?

THE WITNESS: That's correct, Your Honor.

Q. (By Mr. O'Donnell): And to clarify the photograph some more, as I understand it, on that same day, once you got to the public road you followed the public road back

up past the entrance, or near the entrance to the ranch and then [85] you've drawn another blank line where you reentered the property?

A. Yes, approximately. The photograph does not allow me to say exactly where it was.

Q. Now, in the affidavit for the search warrant filed by Special Agent Surovec, it indicates that after you smelled the odor that you then crossed a fence. Which fence? Directing your attention to Government's Exhibit 13, which fence did you cross after you smelled the odor?

A. This one here. The one that was on the edge of the first pole barn.

Q. The one that connects there with what is called the pole barn?

A. Yes, sir.

Q. Now, I want to direct your attention to the next day, November 6th, 1980. Did you have occasion on that day to go back upon Mr. Dunn's property?

A. Yes, on the 6th.

Q. On how many occasions?

A. Twice.

Q. Let's start with the first one. Approximately what time did you make the first entry into Mr. Dunn's property?

A. Early afternoon, say, around 1:00 o'clock, 12:30.

MR. O'DONNELL: Your Honor, may I approach the witness?

[86] Q. (By Mr. O'Donnell): I'm going to hand you Government's Exhibit No. 1 again and ask you to, referring to Government's Exhibit No. 1, the photograph, tell the Court the general route that you took.

A. Well, it was basically the same route we took the first day. We started out in the woods and then found that same open field, walked down the open field, at this time to a point that I estimate it would take us on a course when we cut in toward the farm house.

Q. Is it correct that you followed the same route as you did the day before, basically, up until you get to some red ink, which I've asked you to mark on the picture?

A. Yes.

Q. Now, what is the significance of the red mark, the red ink?

A. The red marking is the route, the approximate route, that I traversed on the 6th, as opposed to the black one, which we traversed on the 5th.

Q. Now, to make it clear, even on the 6th, you went the black route up to the red ink?

A. Yes.

Q. Now, tell us, explain the markings of the red ink now where you went.

A. Well, we attempted to come in once again from the back of the barn, and I cut into the trees approximately where [87] I thought I'd come out by the back of the barn.

Q. Now, have you depicted this in red ink on the photograph?

A. Yes, I did.

Q. All right. Go ahead, sir.

A. But unforunately I came out in front of the house and ran into the road that led to the place, so at that point then we just continued across the road that we found led to the home, to the outside, again, similar to the last part of the route we took the first time—

Q. On the 5th?

A. Yes, sir. And we came up to the edge of the trees. Since it was daylight we crossed to the opposite side of the outside fence and then proceeded up to the outside part of the fence.

Q. Have you marked that route with red ink?

A. Yes, I have.

Q. I hand you now Government's Exhibit 2, which is the other photograph, and did you mark on that photograph with red ink your route on November 6th?

A. Yes, this would be a continuation of Government's Exhibit 1, and it shows to the edge of the picture in red the route that I continued to take on the 6th.

Q. Now, directing your attention to Government's Exhibit 13 with the pointer, where are you now after we leave [88] Government's Exhibit 2?

A. For clarification for His Honor, there is another fence running along here, outside. There are trees all along in here. We kept to the trees until the trees ran out in one specific area where there is a clearing visible from the home. We then went wide, got over the outside fence, and it's somewhat, it's not a flap but it has some dip and some hills and gulleys to it. They're not steep but they're enough that you can creep down along and stay low to the ground and be out of sight from the home, which we did. We wound up at a fence that intersects this fence in this juncture here. We then followed that fence line along—

Q. All right. Let me ask you, who was with you on this occasion?

A. This is agent Fred Thomas.

Q. A DEA agent?

A. Yes.

Q. All right. Go ahead, sir.

A. We followed along to the back, behind this pole barn, back behind here, until we got in a position where we were invisible from the home because of the barn where the lab was. I then cut directly up to the back here where I got, where, once again, we checked the smell that came out of the little narrow opening at the corner there.

Q. The same smell, the same odor?

[89] A. Yes, exactly.

Q. What did you and Special Agent Thomas do then?

A. We then checked the area once again to see if there was anyone about, crossed back along to the side here, and back over that same fence, and into the same area and looked into the lab through the fish net again, saw that everything was the same as it was the previous day.

Q. Did you or Special Agent Thomas actually enter that door that you've described, the door that came up to about you waist?

A. No, we did not, We just stood, once again, right outside the door, looked through the netting, and then made our withdrawal back across the fence and off into the woods.

Q. Now, when you're standing there just outside the door, or the gate, as you've described it, looking into the lab, are you underneath part of that shed?

A. Yes, we're underneath the overhang portion.

Q. But that all open?

A. It's all open.

Q. Now, again, where did you and Thomas exit the land?

A. From here. We crossed the same wooden fence, out the back. along the side here, into the cover of the trees, which is a grove of trees. It's a tree belt that runs along here, and back off that way.

Q. Now, all of the surrounding land is uninhabited land, [90] is that correct?

A. Yes, surrounding this way. It's all uninhabited. The only other home that I found was right over in here somewhere.

Q. Is that on Mr. Dunn's property?

A. No, I believe that belongs to someone else.

Q. Now, these pins, or these fences as you've described them, what type of pin is this, the fences that connect here with the barn?

A. This is a cattle situation. To the best of my knowledge it would be a situation where this was an open barn for cattle, and there's a cattle feed here that swings both ways and the rest of it is nothing more than fences, barbed-wire type.

Q. What about this fence right here, the one that you crossed first on November 5? What type of fences are they?

A. These are all one, two, or three-strand barbed wire fences.

Q. Just typical ranch type fence?

A. Some of them are in ill repair. Some of them are in good repair.

Q. Did you ever have occasion to observe the fences that surrounded the total acreage, parts of the fence?

A. Yes, there are a lot of fences, a lot of different sets of fences and they're all the barbed wire type.

[91] Q. Now, the second entry on the 6th, approximately what time was that?

A. That was somewhere around 7:00 o'clock or so in the evening.

Q. 7:00 P.M.?

A. Yes.

Q. And who was with you on this occasion?

A. Well, there were four of us on this occasion, Special Agent Thomas and then two other special agents from the Austin office that were with us, that were with Thomas and I, but on this occasion I was the only one to get close to any of the Dunn property.

Q. All right. Tell the Court on that second entry on the 6th where you went.

A. I went right up the driveway, into the woods, near the driveway, up the driveway in a position to see if there were any cars in the carport.

Q. Okay. How far away from the house were you, approximately?

A. Oh, I would say I got within a hundred yards, or 50 yards, just so I could make out the home and the carport.

Q. So you would be out in the woods?

A. I was on the driveway at this point toward the woods.

Q. And that would be approximately 100 yards away from the house?

[92] A. It's hard to judge. It was very dark. I would say anywhere from 100 to 50 yards from the home, looking up into the carport.

Q. And what did you do then after you looked into the carport?

A. There were no cars there so I made my withdrawal and walked right straight down the road.

MR. O'DONNELL: May I approach the witness?

THE COURT: Yes, you may.

Q. Special Agent Gospodarek, I'm going to hand you now a number of photographs. Starting with Government Exhibit No. 3, can you identify that photograph?

A. Yes, I can.

Q. What is that?

A. This is a photograph of the lab barn taken from the edge of the barn.

Q. So the barn that you speak of is where the lab was found?

A. Yes, it's in the back of the picture. It covers a majority of the picture.

Q. The building in the lefthand corner of the photograph, what building is that?

A. I believe that's the far edge of the garage on that side.

[93] Q. I'm going to hand you now what's been marked as Government's Exhibit No. 4. Can you identify that, sir?

A. Yes, I can.

Q. What is that?

A. This will be, the far righthand middle corner of the photo will be where the lab was located and it also includes the water tank and the windmill that was nearby.

Q. All right. I'm going to hand you what's been marked as Government's Exhibit No. 5. Can you identify that?

A. Yes, that's the actual building that the lab was located in.

Q. All right. Depicted in Government's Exhibit No. 5 is a blue pickup backed into the barn. Do you see that, sir?

A. Yes, sir.

Q. is that blue pickup backed up into the area where you were standing on November 5th and November 6th when you looked into the lab?

A. Very closely, yes. That is the area we were in, the far corner of that building.

Q. So you would have been standing, basically, where the back of this truck is?

A. yes, we were in that area.

Q. I'm going to hand you Government's Exhibit 6. What is that?

A. That's the same picture except closer, and it [94] further depicts the truck backed in under the tin shed, and the openness of the shed and where we were standing.

Q. So, again, you would have been standing, on each occasion that you looked into the lab, basically at the back of where this pickup is?

A. Yes.

Q. Government's Exhibit No. 7, can you identify that?

A. This is a shot, a picture taken from the rear entrance of the home back toward the lab site. It shows the path back to the barn.

Q. No. 8?

A. That's the house itself, the farm house.

Q. Is that the back side or the front side?

A. That's the back side.

Q. No. 9?

A. This is the front side of the home.

Q. No. 10?

A. That's looking along the side of the home.

Q. Back toward the barn?

A. This is the barn. I recognize that. I didn't get on this side at all.

Q. So the structure in the front of the picture is the house?

A. Yes.

Q. And the structure in the back of the barn was the lab?

[95] A. Yes.

Q. No. 11?

A. That's the front of the home.

Q. And No. 12?

A. It's another shot of the lab site where the pickup backed into it.

Q. Let me ask you what was this pickup doing backed up to the lab entrance?

A. I wasn't there when the lab was seized but I assume that they were loading the lab into it.

Q. The agents would be loading the lab?

A. Yes, at that point.

MR. O'DONNELL: Pass the witness, Your Honor.

MR. McCULLOUGH: We'd like to change the order of cross, Your Honor.

THE COURT: Mr. Newlin, you may proceed.

MR. NEWLIN: Thank you, Your Honor.

MR. O'DONNELL: Your Honor, would the Court like to view the photos?

THE COURT: They haven't been admitted. Give them to counsel, please.

MR. O'DONNELL: Your Honor, I will at this time offer all of the photographs.

MR. NEWLIN: May we have a moment, Your Honor?

[96] THE COURT: Yes, you may.

MR. NEWLIN: Your Honor, could the Court withhold consideration of these until we finished our cross examination?

THE COURT: Yes, I indicated I would, Mr. Newlin.

MR. NEWLIN: All right, thank you, we'll proceed, Your Honor.

CROSS EXAMINATION

BY MR. NEWLIN:

Q. Agent Gospodarek, you said that you were the team leader of this group?

A. Yes, as far as the DEA personnel are concerned.

Q. And so you were in charge of this operation, is that correct?

A. No, sir.

Q. Who would have been in charge of it?

A. This was Special Agent Surovec's case.

Q. Are you a superior of Special Agent Surovec's, by any chance?

A. Yes.

Q. So although you were present and at the scene it was his case and he was in charge?

A. Let me elaborate on that. At the time on November 5th [97] and 6th, Agent Surovec was not present. Agent Surovec did not arrive until later, on the 6th or the 7th; probably on the morning of the 7th, if I remember correctly. I left on the 7th.

Q. When you first went onto this land did you know who owned the property?

A. No.

Q. Did you know what the boundaries of the property were?

A. No.

Q. On what date did you learn who owned the land?

A. The 6th.

Q. So if Agent Surovec in his affidavit said that on November 5th you had telephonically advised him that it was owned by Ronnie Dale Dunn and that in fact that you all procured information about Mr. Dunn, that would be incorrect?

A. Let me refresh my memory here. The actual knowledge of the ownership of the land came from the game warden, and that well could have been on the after-

noon of the 5th. The actual dimensions as to what the property consisted of and what not we would have gotten on the 6th, but we had no boundaries to go from. To the best of my recollection, whenever we contacted the game warden, whether it be the 5th or the 6th, was when we found out who owned the property. Then I did my subsequent criminal checks and record checks and [98] attempted to verify other information.

Q. Okay, sir, you first went to this farm location on November 5th, is that correct?

A. Yes, at night to make the entry on the property. I was there during the early afternoon of the 5th.

Q. Okay, sir, but your first entry onto the property was that evening?

A. yes, sir.

Q. So it is possible that you did in fact at the time that you went on the property already know who the owner of the property was, is that correct?

A. Yes, it is possible. I don't recall that specifically I know I did find out who did own it. That was my job.

Q. You found that out from game warden Warren Guthrie?

A. Yes, sir?

Q. And he told you at that time that it consisted of 198.1 acres?

A. I believe that he gave us the figure of the acreage. I don't remember the exact one but I do now know that exact figure.

Q. Okay, sir, did you seek anyone's authority to go onto this property?

A. No, sir.

Q. Have you had occasion to read the affidavit which was sworn to to secure the search warrant for this ranch?

[99] A. I may have read it over, yes.

Q. Do you recall whether you have or have not read it over?

A. I have read it in the past. I have not read it recently.

Q. Okay, sir. Now, knowing what you know now, when you first smelled the odor which you alleged to be the odor of phenylacetic acid, were you on the property owned by Ronald Dale Dunn?

A. To this time I can say I still do not know whether I was or wasn't.

Q. Do you have any idea, the drawing that you have there, how may acres is involved in that drawing?

A. No, sir, I do not.

Q. You have no approximation?

A. I have no idea how many acres were involved.

Q. Did you inspect the barn only because of the odor that you smelled?

A. No.

Q. So you would have inspected the barn if you had smelled nothing?

A. We would have gone that direction as we had seen the truck at the barn earlier in the day.

Q. So you are not relying on that odor or anything that you saw there, smelled there, as the basis for going to look [100] at this barn?

A. Well, certainly once the odor was coming from that direction it reinforced my wanting to look at the barn.

Q. Yes, sir, but I think you already stated that you were going to that barn anyway, is that correct?

A. We were heading in that direction, yes, sir.

Q. And you were going to go to the barn and try to see what was inside?

A. Yes. sir.

Q. And you had made no inquiry as to what the property boundaries were, et cetera, anything concerning this?

A. No.

Q. And in fact prior to attempting to secure a search warrant you participated in three entries into this piece of property, did you not? Or onto this piece of property?

A. Prior to the signing of the warrant, yes.

Q. There is some dispute, now, or some question as to whether or not at the time of the third entry as to whether or not the warrant had in fact been issued, is that correct?

A. Not in may mind there's not. I don't know when the warrant was signed and I was in there at approximately 7:00 o'clock the last time I went in there.

Q. Did you know that someone was attempting to secure a warrant for this property at that time?

A. Special Agent Surovec on the day of the 5th was [101] instructed to begin gathering the evidence to put into the affidavit for the warrant.

Q. And did you see to it that he was furnished, in fact, a legal description of this property?

A. Yes, I got that description from Warden Guthrie.

Q. Did you tender that directly to Agent Surovec?

A. I believe, if my recollection serves me correctly on this incident, the actual description was tendered to Surovec through another agent who read it to a secretary who took it in shorthand because it was lengthy.

Q. But that did describe the piece of property that you now know to be 198.1 acres?

A. Yes, Game Warden Guthrie did obtain documents that had the legal description on the face of it.

Q. So the search warrant that you sought was for that entire premise, 198.1 acres, is that correct?

A. Yes. The search warrant was sought for Mr. Dunn's property in that area, including the house and the barn.

Q. So even though you were seeking a search warrant for that piece of property you went ahead and went on the piece of property a third time, is that correct?

A. Yes. We had been seeking the warrant since the 5th.

Q. Now, as of the 5th, what facts did you have that would have—Prior to your first entry on the property what facts did you have to justify or to go and seek a warrant [102] before a magistrate?

A. We had the precursor chemicals being driven from Houston to the ranch. And then we found the missing beeper. And Mr. Dunn's criminal record and a prior arrest for manufacture was what started it. And the entry on the property was to gather the final piece of probable cause, which was the smell of the sight of the actual operation.

Q. In you experience as a DEA agent did you feel that that final bit of probable cause was necessary?

A. Well, without that it was circumstantial. With that it was a fact, in my opinion.

Q. And you felt it was within your power to go ahead and go on this property and seek some additional information?

A. Yes, I thought it was quite all right. I had done it before in other cases.

Q. Did you participate in any entries into this land after the time that the warrant was executed by the magistrate but prior to its execution?

A. I don't know the time of the signing of the warrant. I left on the Friday in the morning right before noon. Those are the only three times I went on the property, the 5th and the 6th. I left on the morning of the 7th.

Q. Do you have any knowledge whether or not other agents of the Drug Enforcement Administration or any law enforcement agency did go on prior to the execution of [103] the warrant?

A. Yes, I do have information that they did.

A. And they went on one more time and withdrew?

A. Well, I understand that they went on to the lab and then withdrew, yes.

Q. On the date of the 5th and 6th I believe you have named four persons, one being yourself, one being Agent Jacobs, one being Agent Thomas, and Martin Fite, who were present and had gone on the property. Were there any other persons?

A. That's not correct. Agent Jacob never went on the property with me. If he did go I didn't know about it. I went on the property the first time, Mr. Newlin, with HPD Officer Martin Fite. The second time I went on the property I went with Special Agent Thomas. The third and final time I went on to the property I was accompanied by Agent Thomas and two other agents from the Austin office. One I believe was Agent Stone, and I don't know the name of the third agent. It was a new female. I had just recently met her.

Q. Have you had occasion to see her here today?

A. No, sir.

Q. You say that you approached this barn after smelling the odor of phenylacetic acid. Could you describe that odor for the Court?

[104] A. It has a very distinct smell, somewhat of a sweetish smell, very sweet but very pungent and strong. It's impossible to describe in words until you've smelled it.

Q. Is it a solid or a liquid?

A. The phenylacetic acid we were dealing with here is a solid.

Q. Do you know what the amount of parts per billion for reception for you to understand and comprehend that it is phenylacetic acid?

A. No, I don't know that.

Q. Do you know what distances that it will carry in the air?

A. No.

Q. Can you differentiate between the smell of phenylacetic acid and phenylacetone?

A. I believe I can.

Q. And do you know what ranges or distances you can make those distinctions at?

A. No, sir.

Q. How was the wind on that evening, that being the evening of the 5th, your first entry on the property?

A. As I recall, very light if any, and the little breeze that there was, if I remember, I considered it to be coming – We had just recently had what we call a blue norther. I'm from up North. This is a new term for me. [105] I've been down here 10 years. But what they call a blue norther blowing, which is accompanied by generally light westerly or northwesterly winds. There was some breeze that night but not much wind.

MR. NEWLIN: May I approach the Exhibit, Your Honor?

THE COURT: Yes, you may.

MR.O'DONNELL: Agent, would it be possible for you to tell us approximately here which direction the wind was blowing, approximately which way is north?

THE WITNESS: Well, in my opinion north is out this way (indicating). The Farm to Market Road at the base where you enter the farm, I believe runs north and south. That's what I'll call it. I'll use that for my direction.

Q. (By Mr. Newlin): So you believe the wind was approximately in this direction from the back of the barn, blowing out, say, toward the water tank?

A. Well, like I say, the wind was very variable and I didn't pay much attention to it, but with those weather conditions I believe the wind would have been from the northwest, and it was very still in the trees and what not.

Q. Approximately how far were you from this barn when you detected this odor?

A. I would say I didn't step it off but anywhere from [106] 50 yards, something like that.

Q. Now, did you feel like you were on the property at that time, that it encompassed this entire farm? Were you clearly on the property?

A. Well, there were several fence lines there. I did not know which fence line depicted the end or the beginning of Mr. Dunn's property. I didn't know.

Q. But you did know it was Mr. Dunn's property somewhere there?

A. The house and supposedly those outbuildings belonged to Mr. Dunn, according to the information we received from Warden Guthrie.

Q. Now, you viewed this first lab action there through a crack in the wall, you said?

A. No, I did not.

Q. Okay. Excuse me. What was it?

A. We viewed the actual laboratory through a fish netting which hung from the top of the pole barn down to the fence, the gate.

Q. Did you have to use a flashlight to view this?

A. Yes.

Q. How many fences had you had to cross from the time that you smelled to the time that you were able to make this initial view?

A. Well, the fences run helter skelter in here, and [107] I know I crossed this one, down along in here, and over to this one—that would be three by the time I got to this point here. We were very careful. This took a long time. It was a lengthy process. I want to point that out to the Court, that trying to determine whether there was anyone home or not, not to be detected. So we crossed back and forth over in here. When we made the initial entry into the pole barn area we crossed what is a wooden fence, I believe, here, and it goes underneath this lean-to type of situation, and right inside that lean-to is the fence or the gate, the fishnetting, and right inside there, the back of it, is the laboratory.

Q. So you had to at least cross one fence here. Where was the locked gate that you discussed, the wooden locked gate?

A. The wooden locked gate is this right here, this black line (indicating).

Q. So it is actually under the roof line here?

A. Under the roof line.

Q. And it was actually locked?

A. Yes, it was locked.

Q. Did you cross that fence, that gate?

A. No.

Q. You just shined it and viewed in?

A. That's all that was necessary.

[108] Q. When you went around back were you able to look inside also?

A. No, you were able to look in through the crack here, and if I remember correctly there is an open portion to this barn on the back, and it's all open along the front. But as far as the laboratory is concerned it is a closed-in area with walls on all sides except for the front where the waist-high gate and the fishnet was.

Q. you went on this property originally at about 10:00 P.M., is that correct?

A. Somewhere in that neighborhood, yes.

Q. And about how long were you all on the property?

A. I would say approximately an hour and a half or longer.

Q. An hour and a half or longer.

A. Well, actually – Are you talking about – Let me ask you. Are you saying on the property – The whole creep or the whole surveillance or whatever you want to call this took a couple of hours. As far as being in the area of the lab, a matter of minutes. Once we determined there was no one in the truck, to look at the lab, just a matter of a few minutes down to the side and then we make our withdrawal.

Q. All right. Let's go to where you parked your car and from the time that you left your car. Where did you park your car?

* * *

[123] THE COURT: Okay. You may.

MR. McCULLOUGH: I'll put a triangle there to distinguish it from the "X".

Is that agreeable?

THE COURT: You may mark it, counsel.

MR. McCULLOUGH: Is this the place?

THE WITNESS: On that side of the building, yes.

Q. (By Mr. McCullough): Is that the approximate distance from the building?

A. No, I don't know what the approximate distance is. I just heard a motor when I got up by the building.

Q. Was it between this tank and the building?

A. It was near the building.

MR. McCULLOUGH: For purposes of the record I have place a triangle or a delta symbol in the location indicated by Agent Gospodarek. Is that a fair location?

THE WITNESS: That's a fair location.

Q. Can you give us within any limits how far you were from that largest pole barn where that triangle is located?

A. I was approaching it, maybe 10 feet. I don't know. I'm guessing. I didn't stop to take any notes.

Q. And at the time that you saw into the building with your flashlight you were within arm's reach or less of the structure itself?

[124] A. Yes.

Q. Now, the things you testified about, the smell of the phenylacetic and the viewing of what you believe to be a laboratory and a chemical process going on, was included in the affidavit for a search warrant for this ranch property?

A. I believe it was.

Q. Again, phenylacetic acid is not a controlled substance?

A. Correct.

Q. Did you enter on any of the three occasions you've testified about any buildings or rooms within buildings on this property?

A. No, we stayed to the outsides of all the buildings.

Q. The only entrance into any of the buildings would have been then when you were standing under the overhang of the pole barn on the occasion where you were looking in at what you thought was a lab?

A. Absolutely.

Q. The empty boxes that you said you saw were in the smaller pole barn, which is to the left in the diagram as shown?

A. Yes.

MR. McCULLOUGH: I pass the witness, Your Honor. I have another item of business with regard to this before we finish, and that is to put into evidence the [125] search warrant affidavit for the search warrant for the Blanco County property.

THE COURT: Mr. O'Donnell?

REDIRECT EXAMINATION

BY MR. O'DONNELL:

Q. Special Agent Gospodarek, once you smelled the odor on November 5, 1980, after you had gotten off the property that night did you call Special Agent Surovec and tell him what you had done?

A. Yes.

Q. Do you recall what you told him?

A. Not specifically.

Q. Do you recall the basic thrust of what you told him?

A. I told him we had seen the laboratory.

Q. Do you recall telling him anything about smelling the chemical odor?

A. Yes.

Q. What did you tell him about that?

A. I told him that as we approached the buildings we got a smell, we followed the smell up and found the laboratory.

Q. Did you tell him what your impression was when you smelled the odor?

A. I felt we had a laboratory.

Q. Did you feel like something was being manufactured?

[126] A. Absolutely.

Q. What?

A. Phenylacetone. That's what they had the chemicals for.

Q. Do you recall if you told Special Agent Surovec that?

A. I had a discussion with him. I didn't take notes and I don't remember exactly what I told him but I believe I told him we had a phenylacetone laboratory.

Q. Briefly I want to show you what's been marked as Government's Exhibit 14. Do you recognize that to be an accurate drawing of the barn where the lab was?

A. Yes, I do.

Q. Now, on each occasion, once on the 5th of November and once on the 6th of November, when you were peering into the laboratory where were you standing?

A. This area (indicating).

Q. Where is the gate that you were looking over?

A. This whole thing runs along here, the gate itself is right here (indicating).

Q. Is this the gate right here?

A. That is the gate.

Q. At the time you were looking into the lab the gate was closed?

A. Yes.

[127] Q. All right. So would you have been standing right outside the gate at this point?

A. I believe on both occasions we were in this area here. We could have been all over that area. I don't recall specifically where I was standing.

Q. But when you looked into the lab it was over the gate?

A. Yes. You could see all along right here.

Q. All right. Now, this portion up to the gate is an open area and is not enclosed in any way?

A. That's right.

Q. In other words, you can walk right up into it?

A. Yes, there is a small fence right here, one of those small wood fences.

Q. But once you get into this pen you can walk right up into where this gate is?

A. Yes, that's where the pictures where the—the truck was backed in there and there was nothing to obstruct it.

MR. O'DONNELL: Nothing further, Your Honor.

THE COURT: Mr. Newlin?

MR. NEWLIN: Thank you, Your Honor.

* * *

[149] MARTIN FITE,

called as a witness by the defendant, and having been duly sworn by the clerk, assumed the stand and testified as follows:

THE COURT: State your full name, please, sir.

THE WITNESS: Martin Fite, F-i-t-e.

THE COURT: Thank you.

DIRECT EXAMINATION

BY MR. NEWLIN:

Q. Mr. Fite, how are you employed?

A. City of Houston police department, narcotics division.

Q. How long have you been so employed?

A. I've been with the City about 10 years and about [150] six years broken service in narcotics.

Q. You are familiar with the investigation against Ronald Dale Dunn?

A. Yes, sir.

Q. And were you involved in the search and seizure that took place there on the 8th of November?

A. Yes, sir.

Q. Was that the first time that you had been on that piece of property?

A. No, sir.

Q. And when was the first time that you went on the piece of property?

A. I believe it was the evening of the 5th.

Q. That would have been approximately three days before?

A. Right.

Q. And who was you with at that time?

A. Special Agent Gospodarek.

Q. And what was your purpose for going onto the property?

A. To check and see if there was a laboratory in operation.

Q. What type of laboratory?

A. An amphetamine laboratory.

Q. Now, did you know at that time who owned this [151] piece of property?

A. No, sir, I do not.

Q. Do you know whether or not Agent Gospodarek knew at that time who owned this piece of property?

A. No, sir, I did not.

Q. Did you have any discussion concerning that?

A. The ownership of the property?

Q. Yes, sir.

A. No. sir.

Q. When did you first learn who was the owner of the property?

A. I believe it was the next morning.

Q. And who did you learn that from?

A. It may have been Gospodarek. I don't recall. It was brought up in conversation after somebody checked the title or grant or whatever it's called.

Q. After the entry on the 5th did you have another occasion to go on the premises prior to the execution on the 8th?

A. I believe I went on the 7th.

Q. And what time of day or night did you go on the 7th?

A. Shortly after dark. I don't know the hour.

Q. Who accompanied you on that occasion?

A. A chemist with the Drug Enforcement Administration.

Q. And what was the purpose of your entry at that time?

[152] A. To show the chemist what we had seen.

Q. Did you have occasion then to go and inspect the laboratory?

A. I don't know how you mean "inspect".

Q. Did you have occasion to go up—You said you wanted to show the chemist something. Did you show the chemist the laboratory?

A. Correct, yes.

Q. Do you see this drawing up here which is marked Government's Exhibit No. 14?

A. Right.

Q. Can you see it from there?

A. Not very well.

Q. You might need to step down if you would. On the occasion of the 7th when you went here with Chemist Goldston, could you tell me where you stood and where Mr. Goldston stood?

A. It would be right in this area here (indicating).

Q. Did you have occasion to enter through this opening here to inspect the reaction, et cetera, that was going on?

A No, sir.

Q. Were you under the same roof of this entire structure?

A. I believe there was an overhang that comes from about this wall here.

[153] Q. At that time there was a warrant in existence, was there not?

A. I don't know. It was a federal warrant being drawn up. I don't know when it was in existence.

Q. No one had told you prior to your going out there that there was in fact a federal warrant which had been issued for that premises approximately 24 hours before?

A. No, the last I heard I think I went back to Houston the day before and I knew that Agent Surovec was going to be drawing up the warrant but I don't recall anybody telling me if it was completely drawn up or not.

Q. When did you get to Johnson City?

A. Which time? The first time?

Q. Did you leave after the 5th?

A. Yes.

Q. And you returned?

A. Right. I returned the 7th.

Q. And you and Mr. Goldston had no discussion about the warrant?

A. No, I didn't discuss the warrant at all.

Q. Did persons besides yourselves accompany you in the general vicinity of the ranch?

A. Yes.

Q. And who accompanied you there?

A. There was a female DEA agent from Austin. I think [154] her name is Mitzi. I'm not real sure.

Q. And who else?

A. I believe Agent Thomas did. I'm not real sure on that either. He's a DEA officer.

Q. Were you in one car?

A. Yes.

Q. And so all four persons went there in one vehicle?

A. I believe so. There were a couple of vehicles in the area.

Q. In other words, you say in the area; would that be on this farm to market road that runs immediately by the ranch?

A. No, it would be on another road that intersects that one. I believe it was beyond the ranch.

Q. Just a road going into someone's property?

A. Right.

Q. Do you recall how many fences you had to climb over to get into the property?

A. Which time?

Q. On the date of the 7th.

A. Yes, I just went up the driveway.

Q. Did you suspect that anyone was there at the time?

A. I didn't know. I was going to take normal precautions.

Q. If you found someone there did you intend to effect [155] an arrest?

A. No, I wouldn't have any jurisdiction for arresting him at that time.

Q. I'm still somewhat unclear as to when you first learned that a warrant had in fact been executed for this premises?

A. You mean when the judge had signed it?

Q. Yes, sir. When did you learn that it existed?

A. Probably late Friday evening. I don't really recall.

Q. Friday being what date?

A. I believe that was the 7th.

Q. After you returned from—

A. From Houston.

Q. After your return from taking Mr. Goldston out here?

A. Right.

Q. Not prior to that time?

A. I don't think I had a conversation with anybody because we had driven back up from Houston. I remember that I had to take the chemist in. We just kind of got with them.

Q. When you met the chemist who was he with?

A. He was with several agents there at the motel.

Q. Do you know the agents' names?

A. No, I don't know too many of these guys that [156] work in this area.

Q. Do you know Agent Surovec?

A. Right.

Q. Was he present?

A. I believe he was.

Q. Do you know Agent Gospodarek?

A. Oh, yes.

Q. Was he present?

A. I don't think so. I don't recall.

Q. Did you go to a motel room?

A. Right. The one on the corner.

Q. You don't recall whose room that was?

A. Originally I think Gospodarek rented that room when we first came up.

Q. But at least you're certain that present there was Agent Surovec and Mr. Goldston?

A. Right, and Mitzi. I think the game warden was there. And two or three other people. I just don't recall who they are.

Q. At any time during any of your entries on to this property did you seek anyone's authority to go on the property?

A. No.

Q. And in total you went upon the property on three occasions?

[157] A. Correct.

MR. NEWLIN: Just a moment, Your Honor. (Brief pause.)

MR. NEWLIN: Pass the witness, Your Honor.

THE COURT: Mr. McCullough?

MR. McCULLOUGH: I have no questions.

MR. O'DONNELL: No questions.

THE COURT: All right. You may step down. (The witness, Robert Louis Surovec [*sic*: should be Martin Fite], was excused.)

In the Supreme Court of the United States

UNITED STATES, PETITIONER

v.

RONALD DALE DUNN

ORDER ALLOWING CERTIORARI. Filed June 23, 1986.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

v.

RONALD DALE DUNN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the area near a barn located well outside a fence that surrounds a ranch house is part of the "curtilage" of that house.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-998

UNITED STATES OF AMERICA, PETITIONER

v.

RONALD DALE DUNN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The original opinion of the court of appeals, dated May 7, 1982 (Pet. App. 16a-35a), is reported at 674 F.2d 1093. The opinion of the court of appeals on remand from this Court, dated July 16, 1985 (Pet. App. 1a-11a), is reported at 766 F.2d 880. The opinions dissenting from denial of rehearing en banc of the 1985 opinion (Pet. App. 39a-47a) are unreported. The order of January 17, 1986, vacating the 1985 opinion (Pet. App. 48a) is unreported. The opinion of February 4, 1986, reinstating the 1982 opinion of the court of appeals (Pet. App. 49a-51a), is reported at 782 F.2d 1226.

JURISDICTION

The judgment of the court of appeals on remand from this Court (Pet. App. 52a) was entered on September 26, 1985. The petition for a writ of certiorari was filed on December 10, 1985. The new judgment of the court of appeals following the order vacating the 1985 opinion (Pet. App. 52a) was entered on February 4, 1986, and the supplement to petition for a writ of certiorari was filed on

April 7, 1986. The petition for a writ of certiorari was granted on June 23, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, respondent Dunn and his co-defendant, Robert Carpenter, were convicted on one count of conspiracy to manufacture phenylacetone and amphetamine, in violation of 21 U.S.C. 846 (Count One). Respondent was also convicted of manufacturing the two controlled substances (Counts Two and Three), and of possessing amphetamine with intent to distribute it (Count Four), all in violation of 21 U.S.C. 841(a)(1) (Pet. App. 16a-17a). Respondent was sentenced to consecutive terms of four years' imprisonment on each of the four counts, and three years' special parole on Counts Two through Four. He also was fined $10,000 on each count (10 R. 17-18). The court of appeals affirmed Carpenter's convictions but reversed those of respondent (Pet. App. 16a-35a). On May 21, 1984, following the decision in *Oliver* v. *United States*, 466 U.S. 170 (1984), this Court granted the government's petition for a writ of certiorari (No. 82-508), vacated the judgment reversing respondent's convictions, and remanded for reconsideration in light of the *Oliver* case. 467 U.S. 1201 (1984). On remand, the court of appeals again reversed respondent's conviction (Pet. App. 1a-11a). After the United States petitioned for a writ of certiorari, the court of appeals vacated the opinion it had written on remand and reinstated the original opinion reversing respondent's conviction, which the court had written in 1982 (Pet. App. 48a-52a).

1. The evidence is detailed in the two opinions of the court of appeals. In the summer of 1980, agents of the Drug Enforcement Administration (DEA) were conduct-

ing surveillance of Carpenter, who was continually ordering large quantities of chemicals and equipment used in the manufacture of amphetamine and phenylacetone, substances controlled by federal law. The equipment included several hot plate stirrers, electric heating devices that apply heat to a container and magnetically stir the contents. Stirrers are used in the "cooking" of chemicals. Pet. App. 17a-18a.

On September 3, 1980, DEA Agent Robert Surovec obtained a warrant from a Texas state judge authorizing the installation and operation of an electronic beeper in a hot plate stirrer that Carpenter had ordered. The beeper was then installed and activated. After Carpenter picked it up, the stirrer was tracked to his residence in Spring, Texas. The signal from this beeper was lost several days later. Meanwhile, warrants were obtained for the installation of beepers in a 55-gallon plastic drum of acetic anhydride and in a container of 100 pounds of phenylacetic acid, both ordered by Carpenter. Both beepers were installed, and the chemicals were delivered to Carpenter. The two beepers were monitored from October 27, 1980, until November 5, 1980. On November 5, agents tracking the beeper in the 100-pound container followed a pickup truck that Carpenter drove from Houston to respondent's ranch near Johnson City, Texas. At that time, the signal from the beeper that had been installed in the hot plate stirrer was detected again. That signal also came from the Dunn ranch. Pet. App. 18a-19a.

DEA agents took aerial photographs of the ranch that afternoon. The photographs showed a ranch house at the end of a private driveway about one-half mile from a public road. A small greenhouse was adjacent to the main residence, and a windmill, a water tank, and two barns were approximately 50 yards from a fence that surrounded the house. The overhead view of the ranch is depicted in a chart reprinted at Pet. App. 51a. The photograph showed

BEST AVAIL

that the pickup truck driven by Carpenter was backed up to one of the barns. The entire ranch, about 198 acres in area, was encircled by a barbed-wire perimeter fence, and there were several other "typical ranch type" (J.A. 25) interior fences, including the one around the residence. The entrance to the private driveway was barred by a locked chain. Pet. App. 3a, 19a, 51a; GXs 1-2; J.A. 12, 26-28, 41.

At about 9 or 10 p.m. on November 5, 1980, DEA Agent Ronald Gospodarek and Officer Martin Fite of the Houston Police Department entered the Dunn ranch by crossing the outer perimeter fence. They tried to make their way toward the barns behind the ranch house, but they became disoriented in the dark. Eventually, they came to the driveway leading to the residence, and from there they approached a fence at the rear of the ranch house. There Agent Gospodarek smelled a strong odor of phenylacetic acid, a precursor of phenylacetone. The officers crossed another fence and looked into an open pole barn, where they saw only empty boxes. Continuing to follow the odor, they approached a second barn, where they heard the sound of a motor running. One end of the barn was open, but the entrance was blocked by a wooden, waist-high gate, which was closed and locked. Some type of netting hung from a tin overhang down to the gate. Standing outside the gate and shining their flashlights into the open side of the barn, the officers saw chemical equipment that appeared to be a phenylacetone laboratory. Pet. App. 3a-4a, 19a-20a; J.A. 12-19, 24-27, 36-37, 40-42; GXs 5-6.

Agent Gospodarek and Officer Fite then left the ranch property. At no point while that they were on the ranch did Gospodarek or Fite cross the fence around the ranch house or enter any of the ranch buildings. After they reported their findings, an affidavit for a warrant to search the property and buildings was prepared. The affidavit included the information obtained from the entry onto the property. The warrant was issued on the evening

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of November 6, 1980, and executed on the morning of November 8, 1980. Respondent was arrested, and the chemicals and equipment were seized. Pet. App. 4a-5a, 22a; J.A. 19-20, 38-39.

2. a. The court of appeals reversed respondent's convictions, holding that the evidence seized pursuant to the search warrant should have been suppressed because the warrant was based on information obtained during an unlawful warrantless entry onto respondent's land (Pet. App. 16a-35a).[1] The court rejected the contention that the search was lawful under the "open fields" doctrine; the court held that the barn was "within the curtilage of the residence," apparently because both the ranch and the barn were surrounded by fences (Pet. App. 23a-29a). The court assumed that the government had probable cause to search the ranch, but it held that a warrant was required for the entry and search (*id.* at 29a-33a).

b. The government sought review in this Court while *Oliver* v. *United States, supra*, was pending. Shortly after the decision in *Oliver*, this Court vacated the decision of the court of appeals and remanded for reconsideration in light of that case (467 U.S. 1201 (1984)). On remand, the court of appeals stated that "[t]he lessons of *Oliver* are clear as applied to a part of the instant inquiry" (Pet. App. 6a). The court therefore abandoned its prior holding that the agents had entered onto the curtilage by crossing the outer fences of the ranch (*id.* at 5a-8a). The court concluded that in light of *Oliver* the barn "was not within the protected curtilage of the Dunn ranch house" (*id.* at 7a-8a). The court, however, went on to state that the barn was not an open field and "ought to be constitutionally protected from warrantless searches if the owner or occupier takes reasonable steps to effect privacy" (*id.* at 10a). The court found that respondent had taken such

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[1] Because Carpenter had no legitimate expectation of privacy in the ranch, his convictions were affirmed (Pet. App. 23a, 35a).

steps and concluded that the officers' visual "search" of the barn from their exterior vantage point required a warrant (*ibid.*). Accordingly, the court again reversed respondent's convictions on the ground that the evidence seized from the barn should have been suppressed.

c. The government's petition for rehearing with suggestion for rehearing en banc was denied in November 1985 (Pet. App. 14a-15a, 38a-39a). In December 1985, six judges of the court of appeals issued three separate opinions dissenting from the denial of rehearing en banc (*id.* at 39a-47a). In January 1986, the panel sua sponte vacated its second opinion (*id.* at 48a). In February 1986, the panel issued a short per curiam opinion stating without explanation that "[u]pon further collegial consideration" the panel had concluded that, contrary to the position the court took in its opinion on remand from this Court, "the barn was inside the protected curtilage" of the ranch house (*id.* at 50a). The panel then reinstated its original opinion of May 1982 (*ibid.*).

SUMMARY OF ARGUMENT

It has long been held that the Fourth Amendment's protection against unreasonable searches of residences extends not only to the home itself but also to the "curtilage" around the home. It is necessary to extend the Amendment's protection beyond the strict confines of the home in order to protect the individual's legitimate expectations of privacy within the home and in the private areas of intimate family activity immediately adjacent to the home. The curtilage concept protects these expectations. Historically, the area of home life extended to outdoor buildings (such as separate kitchens and "outhouses") necessarily associated with the dwelling, and those buildings came to be regarded as part of the curtilage. But the typical home no longer depends on such separate

buildings for the daily activities of home life, and neither the common law roots of the curtilage concept nor the Fourth Amendment values reflected in this Court's decisions require that the concept be extended to protect such outbuildings as distant barns. Instead, the curtilage of a home should be construed narrowly to extend only to the limited area that immediately surrounds and is closely associated with the home and the intimate activities of family life.

To give concrete meaning to this concept, and to make it administrable by law enforcement officers in the field, the Court should make it clear that the curtilage never extends beyond the nearest fence surrounding a residence. The curtilage originally and historicaily was a fenced-in area surrounding a residence, and other tests to determine whether an area is within the curtilage have arisen only because of the need to define the curtilage in the absence of a fence or in cases where the fence is too distant for the entire area within it to be called curtilage. American cases are consistent in recognizing that areas and buildings within a small common enclosure with the dwelling are within the curtilage, and that areas and buildings outside such an enclosure are not. Therefore, a bright-line rule for fenced property is appropriate. No other rule would be consistent with the observation by this Court in *Oliver* v. *United States*, 466 U.S. 170, 182 n.12 (1984), that, "for most homes, * * * the curtilage will be clearly marked."

Even if the balancing test developed in the courts of appeals rather than a bright-line rule is employed, the barn in this case fell outside the curtilage. It was separated from the house by a fence, it was in no way associated with the intimate activities of family life, and it lay a considerable distance away from the house. Thus, all three factors used by the courts of appeals point toward a determination that the barn was not within the curtilage. Accordingly, the officers did not violate the Fourth Amendment by peering into the barn.

ARGUMENT

RESPONDENT'S BARN WAS NOT WITHIN THE "CURTILAGE" SURROUNDING HIS HOME

A. THE CURTILAGE OF A HOUSE SHOULD BE DEFINED NARROWLY, IN KEEPING WITH ITS COMMON LAW RATIONALE AND THE DECISIONS OF THIS COURT

The curtilage concept is an important feature of the Fourth Amendment's protection against unreasonable searches and seizures. Because the Fourth Amendment limits its "special protection * * * to the people in their 'persons, houses, papers, and effects' " (*Hester* v. *United States*, 265 U.S. 57, 59 (1924)), the Amendment does not restrict searches and seizures of open fields outside a person's house.[2] The house, however, has been construed in Fourth Amendment law to mean more than a single structure with four walls. Instead, courts have extended Fourth Amendment protection to the curtilage; and "they have defined the curtilage, as did the common law, by reference to the factors that determine whether an individual may expect that an area immediately adjacent to the home will remain private" (*Oliver* v. *United States*, 466 U.S. 170, 180 (1984)).

Unquestionably, there are areas beyond the four walls of a house that deserve Fourth Amendment protection. An individual has an expectation, which society is prepared to recognize as reasonable (see *Oliver*, 466 U.S.

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[2] *Oliver* v. *United States*, 466 U.S. 170, 176 (1984); see Amsterdam, *Reflections on the Fourth Amendment*, 58 Minn. L. Rev. 349, 356 (1974) (footnote omitted) (" '[S]earches' and 'seizures' are not regulated by the fourth amendment except insofar as they bear the requisite relationship to 'persons, houses, papers, and effects.' "); Moylan, *The Fourth Amendment Inapplicable Vs. The Fourth Amendment Satisfied: The Neglected Threshold of "So What?"*, 1977 S. Ill. U.L. Rev. 75, 92 ("The fourth amendment is simply not 'out there' in the open fields.").

at 177), that the police will not trespass over an area closed to the public in order to peer through a window into his home.[3] A small back yard surrounded by a high fence is "intimately linked to the home, both physically and psychologically" (*California* v. *Ciraolo*, No. 84-1513 (May 19, 1986), slip op. 5), and thus enjoys Fourth Amendment protection from physical invasion. The concept of curtilage is appropriately invoked to support the Fourth Amendment protection given these areas.[4]

There was a time when "the intimate activity associated with the 'sanctity of a man's home and the privacies of life' " (*Oliver*, 466 U.S. at 180 (quoting *Boyd* v. *United States*, 116 U.S. 616, 630 (1886)) extended beyond a small, fenced back yard and the area from which one could peer through windows. In contrast to the typical modern home, which contains indoor facilities for sleeping, eating, and sanitation, the home of bygone days often included an outdoor privy and perhaps a separate kitchen or smokehouse, fully deserving of the protection against invasions of privacy that flows from being within the curtilage.

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[3] See, *e.g.*, *Texas* v. *Gonzales*, 388 F.2d 145, 147-148 (5th Cir. 1968); *Brock* v. *United States*, 223 F.2d 681, 685 (5th Cir. 1955) (footnote omitted) ("Whatever quibbles there may be as to where the curtilage begins and ends, clear it is that standing on a man's premises and looking in his bedroom window is a violation of his 'right to be let alone' as guaranteed by the Fourth Amendment."). By contrast, the Fourth Amendment does not forbid police officers to approach the house by a driveway or walkway that is open to the public and observe what the public may observe. See, *e.g.*, *United States* v. *Ventling*, 678 F.2d 63 (8th Cir. 1982); *United States* v. *Magana*, 512 F.2d 1169 (9th Cir. 1975).

[4] The curtilage may not, however, receive the same "degree" of Fourth Amendment protection as "the home itself" (*Oliver*, 466 U.S. at 180 n.11; see United States v. *Smith*, 783 F.2d 648, 651-652 (6th Cir. 1986); *United States* v. *Roberts*, 747 F.2d 537, 540-543 (9th Cir. 1984)). For example, the curtilage does not enjoy protection from aerial surveillance. *California* v. *Ciraolo*, *supra*.

It was to protect those dwelling areas from invasion that the concept of curtilage first emerged as part of the law of burglary. At common law, the offense of burglary consisted of breaking and entering into a "mansion house" at night with felonious intent (4 W. Blackstone, *Commentaries* *223-224). The "mansion house" was deemed to include "all it's branches and appurtenants, if within the curtilage or home-stall" (*id.* at *225) on the theory that these were part of "a man's castle of defence" (*ibid.*). According to Blackstone, a "distant barn" was not part of the curtilage, but burglary could be committed in a "barn * * * parcel of the mansion-house, and within the same common fence, though not under the same roof or contiguous" (*ibid.* (footnote omitted)). American courts followed the English precedent of holding that breaking into the curtilage was burglary, but that breaking into more distant portions of a piece of property was not. See, *e.g.*, *Wright* v. *State*, 12 Ga. App. 514, 77 S.E. 657 (1913) (breaking into smokehouse 200-300 yards from dwelling is not burglary); *State* v. *Sampson*, 12 S.C. 567 (1880) (breaking into millhouse 75 yards from dwelling, on opposite side of public road and not enclosed by a fence, is not burglary). Judge Charles Moylan summarized the reason for the development of the common law concept of curtilage as follows (Moylan, *supra* note 2, 1977 So. Ill. U.L. Rev. at 87):[5]

> Th[e] dwelling area—called the curtilage—was readily discernible when the kitchen, the laundry, the springhouse, the woodshed, and most particularly the "outhouse" were not within the four walls of the mansion house. A man of the 19th Century * * * had the same right to resent being surprised by an intruder at 3 a.m. as he walked down the garden path to the privy as

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[5] See also Comment, *Curtilage or Open Fields?:* Oliver v. United States *Gives Renewed Significance to the Concept of Curtilage in Fourth Amendment Analysis*, 46 U. Pitt. L. Rev. 795, 813 (1985).

> a man of the 20th Century * * * has a right to resent being surprised by an intruder at 3 a.m. as he walks down the hall to the bathroom. The expectation of privacy is a constant; only the location of the "facility" has changed.

Because the typical structure of residences has changed, the interpretation of the term "curtilage" most faithful to its common law origins is a narrow one. Rarely, in modern times, will outbuildings separate from the dwelling itself be so intimately connected with family life that they have that heightened expectation of privacy that led the common law to make their invasion a burglary and has led this Court to give them special protection against searches and seizures.[6]

In its applications of the concept of curtilage, this Court has never embraced an expansive definition of the term. The Court in *Hester* v. *United States, supra,* rejected an argument (see Br. for Plaintiff in Error at 6-7) that property 50 to 100 yards from a house was within the curtilage and was therefore protected by the Fourth Amendment from trespass by law enforcement officers. The Court, however, did not define the concept in *Hester*, or even refer to the "curtilage" concept by name.

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[6] Of course, even in modern times there will be some outbuildings that share with the home itself the requisite connection to the intimate activities of family life and will remain protected as part of the "dwelling area," or curtilage, even under a narrow reading of the term. Most obviously, a rural home that still depends on separate facilities for some of the essential functions that are now generally carried on indoors will be entitled to have those facilities protected as curtilage. In addition, some outbuildings even on the grounds of more typical modern homes may be shown to be used as part of the home itself. See, *e.g.*, *Fox* v. *State*, 179 Ind. App. 267, 270-271, 384 N.E.2d 1159, 1163 (1979) (converted barn that was insulated, paneled, and equipped with furnace, telephone, and stereo was used for family purposes and was therefore part of curtilage).

Justice Harlan, dissenting in *Poe* v. *Ullman*, 367 U.S. 497 (1961), first suggested the rationale behind Fourth Amendment protection of the curtilage. He explained that, "if the physical curtilage of the home is protected, it is surely as a result of solicitude to protect *the privacies of the life within*. Certainly the safeguarding of the home does not follow merely from the sanctity of property rights." 367 U.S. at 551 (emphasis added). The more recent descriptions of curtilage in *Oliver,* in *California* v. *Ciraolo, supra*, and in *Dow Chemical Co.* v. *United States*, No. 84-1259 (May 19, 1986), similarly refer to the curtilage not so much as a protected area in itself but as an area whose protection is vital to the privacy of home life.

The *Oliver* Court described curtilage as "the land immediately surrounding and associated with the home" (466 U.S. at 180). Consistent with the view that curtilage describes the "dwelling area" in which persons engage in private activities associated with the home, the Court referred to curtilage as "the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life' " (*ibid.* (quoting *Boyd* v. *United States*, 116 U.S. 616, 630 (1886)). Curtilage, the Court added, could be described as "an area immediately adjacent to the home [that an individual reasonably may expect] will remain private" (*ibid.*). See also *id.* at 182 n.12, 183 n.14.

The *Ciraolo* Court described the term in much the same way: the Court noted that the fenced-in back yard determined to be curtilage in that case was "intimately linked to the home, both physically and psychologically" (slip op. 5). And in *Dow*, the Court described curtilage in similarly restrictive terms, referring to it as an area involving "intimate activities associated with family privacy" (slip op. 9),

and as "an area immediately adjacent to a private home, where privacy expectations are most heightened" (*id.* at 9 n.4).[7]

In sum, the definitions of curtilage used by this Court focus on the intimate activities of family life and the protection of a limited area that immediately surrounds and is closely associated with the home. This Court has described as curtilage only a fenced-in back yard (*California* v. *Ciraolo, supra*), a garage a few feet from a residence (*Scher* v. *United States*, 305 U.S. 251, 253 (1938)), and a store associated closely with a home (*Amos* v. *United States*, 255 U.S. 313, 314 (1921)). It has regarded a field 50 to 100 yards distant from a home as being outside the curtilage (*Hester* v. *United States, supra*). In this day and age, outbuildings such as a barn will seldom be the setting for intimate family activities. Instead, the barn and the area immediately around it are likely to be used for activities such as the storage of machinery and the shelter and nurture of animals. Thus, the Court should look askance on efforts to give to the area around an outbuilding or barn—and particularly an outbuilding or barn 50 yards or more from the home—the protection afforded to curtilage by the Fourth Amendment.

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[7] The dissenters in *Ciraolo* and *Dow* adopted an equally restrictive definition of the term "curtilage." In *Ciraolo*, the dissenters described the curtilage as "the area immediately surrounding [citizens'] homes" (slip op. 6 (Powell, J., dissenting)); as " 'an area of domestic use immediately surrounding a dwelling and usually but not always fenced in with the dwelling' " (*ibid.* (footnote omitted) (quoting *United States* v. *LaBerge*, 267 F. Supp. 686, 692 (D. Md. 1967)); as a "private family area" (*id.* at 7); and as "the private area immediately adjacent to a home" (*id* at. 9). The dissenters in *Dow* likewise explained that the purpose of the curtilage doctrine "is to identify the limited outdoor area closely associated with a home" (slip op. 11 (Powell, J., dissenting)).

B. THE CURTILAGE CAN EXTEND NO FARTHER THAN THE NEAREST FENCE SURROUNDING A HOUSE

It is, of course, desirable to define the curtilage in a way that will be "workable for application by rank-and-file, trained police officers" (*Illinois* v. *Andreas*, 463 U.S. 765, 772 (1983)) to the extent that a workable definition can be established without doing violence to the common law history of the curtilage doctrine and the values that underlie its use in the Fourth Amendment context. Indeed, this Court has emphasized that the curtilage should be a well-defined area (*Dow*, slip op. 9 n.3; *Oliver*, 466 U.S. at 182 n.12). A bright-line rule, consistent with the development of the curtilage doctrine, is sufficient to dispose of this case. Specifically, the curtilage should extend no farther than the nearest fence surrounding a fenced house. Although this definition does not dispose of cases in which there is no fence immediately surrounding the home, it provides a ready means of resolving the large number of cases in which defendants contend that the curtilage should extend beyond the yard fence and into areas that have not traditionally been accorded the status of curtilage.

Historically, "curtilage" has signified a fenced yard. "The word 'curtilage' from its origin has denoted only the inclosure surrounding a dwelling house" (*United States* v. *Vlahos*, 19 F. Supp. 166, 170 (D. Or. 1937) (footnote omitted); see also *United States* v. *Romano*, 388 F. Supp. 101, 104 n.4 (E.D. Pa. 1975); *Edwards* v. *Derrickson*, 28 N.J.L. 39, 72 (1859)). In its earliest usage, the word "signified the land with the castle and out-houses, enclosed often with high stone walls, and where the old barons sometimes held their court in the open air" (*Coddington* v. *Beebe*, 31 N.J.L. 477, 485 (1863)).

As property ownership in England became more widely dispersed, the term came to mean the fenced-in enclosure around any house, and the extent of the curtilage in burglary cases was determined by whether a structure was within or outside the protective fence around a house. For example, in *Rex* v. *Garland*, decided at Somerset Lent Assizes in Easter Term 1776, the judges found that a prisoner could not be convicted of burglary for breaking into an outhouse "separated [from the dwelling house] by an open passage eight feet wide: and * * * not connected with the said dwelling-house by any fence inclosing both" (2 E. East, *Pleas of the Crown* 493 (London 1803); see also 1 W. Hawkins, *Pleas of the Crown* 163 (T. Leach 6th ed. London 1777)). The fence rule provided an adequate safeguard against burglary for the areas and buildings that were part of the 18th-century English homestead, for it was customary in England to enclose all such buildings within "a fence or stone wall, enclosing a small piece of land embracing the yards and outbuildings near the house, constituting what is called the court[,] * * * so constructed as to add greatly to the security of the property within it" (*People* v. *Taylor*, 2 Mich. 250, 251 (1851); see also R. Davis, *Federal Searches and Seizures* § 1.321 (1964)).

Even in 18th-century England, however, there was not always a fence around the home, and the concept of curtilage was adjusted to deal with unfenced property. At Newcastle Summer Assizes in 1787, the court held that a burglary could be committed in a barn not within the same enclosure as a dwelling house because, although there was no wall around the property, the barn and dwelling were under the same roof (*R.* v. *Brown*, 2 E. East, *supra*, at 493). Numerous American courts, noting that the custom of erecting a protective wall had never fully taken hold in this country, devised rules for determining the curtilage when there was no enclosure. *E.g.*, *Wait* v. *State*, 99 Ala. 164, 13 So. 584 (1893); *Wright* v. *State*, 12 Ga. App. 514,

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77 S.E. 657 (1913); *State* v. *Bugg*, 66 Kan. 668, 72 P. 236 (1903); *People* v. *Taylor, supra*; *Bare* v. *Commonwealth*, 122 Va. 783, 794, 94 S.E. 168, 172 (1917). The tests that have come to be used to determine the extent of the curtilage were explicitly designed to take the place of the original, easily applied rule that the extent of the curtilage was determined by the yard fence. See *Hutchins* v. *State*, 3 Ga. App. 300, 59 S.E. 848 (1907).[8]

When there *has* been a fence surrounding a dwelling, courts applying both the common law and the Fourth Amendment have regarded that factor as important. "The presence of a fence or other boundary is an important factor, but not a controlling one, in determining the extent of the curtilage." R. Davis, *supra*, § 1.323; see *People* v. *Edwards*, 71 Cal. 2d 1096, 1101 n.2, 458 P.2d 713, 716 n.2, 80 Cal. Rptr. 633, 636 n.2 (1969) (en banc). Thus, numerous courts have held an outbuilding to be within the curtilage because, in addition to being close to the dwelling house, it was within (or formed part of) a common en-

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[8] The *Hutchins* court stated (3 Ga. App. at 304, 59 S.E. at 849 (emphasis added)):

> As the word "curtilage" is thus used [in English burglary cases] it always denotes an enclosure, including the dwelling-house. It is true that changed conditions in this country, and the absence of fences in many instances, may necessarily affect our definition so as not to render the presence of an enclosure indispensable. *But to supply the place of an enclosure, there must be apparent a necessity for the use of the outhouse alleged to be within the curtilage, either as a part of the dwelling-house, or that the use of such outhouse is indispensably necessary to the domestic comfort of the household in the occupancy of the dwelling.*

The court held that a barn 50 yards away from a dwelling house lay outside the curtilage even though there was no fence surrounding the yard of the dwelling house.

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closure with the dwelling house.[9] Other courts have held an area or outbuilding not to be within the curtilage because it lay outside an enclosure that included the dwelling house.[10] To our knowledge, no American court other than the court below has ever invalidated a search of an area separated from the dwelling house by a fence surrounding the dwelling house on the theory that the searched area was within the curtilage.[11]

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[9] *E.g.*, *United States* v. *Van Dyke*, 643 F.2d 992, 994 (4th Cir. 1981); *Roberson* v. *United States*, 165 F.2d 752, 754 (6th Cir. 1948); *Norman* v. *State*, 379 So. 2d 643, 647 (Fla. 1980); *Commonwealth* v. *Barney*, 64 Mass. (10 Cush.) 480 (1852); *People* v. *Griffith*, 133 Mich. 607, 608, 95 N.W. 719, 720 (1903); *State* v. *White*, 49 N.C. (4 Jones) 349, 352 (1857); *Russell* v. *State*, 37 Okla. Crim. 71, 256 P. 758 (1927); *State* v. *Russo*, 68 Or. App. 760, 764, 683 P.2d 163, 165 (1984).

[10] *E.g.*, *Patler* v. *Slayton*, 503 F.2d 472, 477-478 (4th Cir. 1974); *Brock* v. *United States*, 256 F.2d 55, 57 (5th Cir. 1958) (concrete house 150-180 feet away from residence and beyond fence surrounding residence was not within curtilage, whether or not residence was actually used as a dwelling house); *Hodges* v. *United States*, 243 F.2d 281, 283 (5th Cir. 1957) (chicken coop within enclosure 100 feet from exclusionary fence surrounding farm home was not within curtilage); *United States* v. *Sims*, 202 F. Supp. 65, 66 (E.D. Tenn. 1962) (pumphouse within fence enclosing dwelling house was within curtilage, but area outside that fence was not, even though within fence that surrounded entire 20-acre farm); *Holland* v. *State*, 11 Ala. App. 164, 65 So. 920 (1914); *State* v. *Wilson*, 2 N.C. (1 Hayw.) 242 (1795) (per curiam); *Luman* v. *State*, 629 P.2d 1275, 1276 (Okla. Crim. App. 1981).

[11] But cf. *Walker* v. *United States*, 225 F.2d 447, 448-449 (5th Cir. 1955) (barn 70-80 yards distant from dwelling and separated by a fence surrounding the barn was within curtilage). *Walker* is distinguishable both because the agents in that case entered the barn without a warrant and because the fence in that case surrounded the barn rather than the house. The fence therefore did not serve to define the area of intimate family activities, as is typically the case with yard fences around the home. In any case, we think it clear that *Walker* was wrongly decided and has engendered other erroneous rulings (see, *e.g.*, *Rosencranz* v. *United States*, 356 F.2d 310, 312 n.1, 313 (1st Cir. 1966); *United States* v. *King*, 305 F. Supp. 630, 634 (N.D. Miss.

Accordingly, it would be faithful to the common law and consistent with the curtilage doctrine as developed by the lower courts for this Court to hold that the innermost fence (if any) around a dwelling marks the outermost possible boundary of the curtilage. Such a rule would be readily administrable by police officers. And such a rule would be entirely consistent with the way that this Court has defined "curtilage." In all but the rarest case, by erecting a fence closely enclosing his home a property owner will have done exactly what the curtilage concept is designed to do—marked off as especially private, and associated with the intimate activities of family life, an area immediately surrounding the home.

Of course, it does not follow that all property within the innermost fence—no matter how far that fence is from the dwelling house—would be curtilage. See *Oliver*, 466 U.S. at 179. The location of a fence at some distance from the dwelling house rebuts any presumption that it demarcates the area that the property owner has determined is associated with the intimate activities of home life; in rural settings, such distant fences "are designed more to keep livestock under control than to keep people out." *State* v. *Stanton*, 7 Or. App. 286, 296, 490 P.2d 1274, 1279 (1971); see also *United States* v. *Williams*, 581 F.2d 451, 454 (5th Cir. 1978), cert. denied, 440 U.S. 972 (1979); *Giddens* v. *State*, 156 Ga. App. 258, 259, 274 S.E.2d 595, 597 (1980), cert. denied, 450 U.S. 1026 (1981). Moreover, a holding that the property owner could establish a curtilage by building a distant fence would be an open invitation to lawbreakers to restructure their property accordingly. As one state court put it, "To extend the concept of immunity

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1969)). See generally *United States ex rel. Saiken* v. *Bensinger*, 546 F.2d 1292, 1296 (7th Cir. 1976) (noting that *Walker* extends curtilage farther from home than any other federal appellate decision), cert. denied, 431 U.S. 930 (1977).

from unreasonable search and seizure so as to prohibit the search of any property included in a fenced area in which a dwelling may be located * * * would extend the protection afforded by the [C]onstitution to an absurdity." *Phillips* v. *State*, 177 So. 2d 243, 245 (Fla. Dist. Ct. App. 1965); see also *DeMontmorency* v. *State*, 401 So. 2d 858, 863 (Fla. Dist. Ct. App. 1981).

Under this analysis, the curtilage would be limited to the area within a yard fence around a house, if the property had such a fence. If not, the curtilage could not be defined as sharply, but it would still be limited to the "dwelling area"—the area immediately surrounding the house that is typically used for intimate activities associated with the home. In any event, as the *Oliver* case makes clear, the curtilage cannot be construed as extending to a huge area within a farm or ranch simply because the entire property, or some large portion of it, is surrounded by a perimeter fence.

Although there might be difficulties in defining the precise scope of the curtilage in a case involving no fence at all, or only a perimeter fence around a large portion of the property, those difficulties are not presented in this case, and they will not be presented in the typical case, where the extent of the yard around the house is readily apparent. The decision in *Oliver*, which indicates that, "for most homes, the boundaries of the curtilage will be clearly marked" (466 U.S. at 182 n.12; accord, *Dow*, slip op. 9 n.3), appears to preclude any rule that treats as curtilage an area—such as the area in this case—that is separated from the dwelling house by an exclusionary fence. The Fifth Circuit so concluded when this case was remanded for reconsideration in light of *Oliver*, holding that respondent's barn was outside the curtilage after "giving particular weight to the presence of the two separate fences plus a fenced-in open space between the large barn and the ranch house" (Pet. App. 7a-8a). By reversing

course and defining the curtilage by a "chancellor's foot" test, the Fifth Circuit has ignored this Court's jurisprudence. Instead, that court has created a definition of constitutionally protected curtilage that would be incomprehensible to those charged with applying the Fourth Amendment's commands, and would go far beyond the traditional definition of "curtilage" at common law and under the Fourth Amendment.

C. THE TRADITIONAL FACTORS USED TO DEFINE THE CURTILAGE DEMONSTRATE THAT RESPONDENT'S BARN WAS NOT WITHIN THE CURTILAGE OF HIS HOUSE

As noted above, we believe that, in cases such as this one involving a house enclosed by a yard fence, a bright-line rule is consistent with the common law and American case law, and is essential if the curtilage concept is to have any meaning to law enforcement officers in the field. Nonetheless, we recognize that the lower courts have generally applied a balancing test rather than a bright-line rule to determine the extent of the curtilage. Even under that balancing test, however, respondent's barn and the area surrounding it lay outside the curtilage.

The classic statement of the balancing test to determine the extent of the curtilage is found in *Care* v. *United States*, 231 F.2d 22, 25 (10th Cir.), cert. denied, 351 U.S. 932 (1956) (footnote omitted):

> Whether the place searched is within the curtilage is to be determined from the facts, including [1] its proximity or annexation to the dwelling, [2] its inclusion within the general enclosure surrounding the dwelling, and [3] its use and enjoyment as an adjunct to the domestic economy of the family.

See also *Ciraolo*, slip op. 7 (Powell, J., dissenting).

None of these three factors favors a determination that the barn was within the curtilage of respondent's house. As recognized by the court of appeals, "[t]he second factor, commonality of enclosure, militates against Dunn's contention that the barn was in the curtilage" (Pet. App. 7a). The third factor, use as an adjunct to the domestic economy of the family, likewise undercuts any claim that the barn was part of the curtilage of Dunn's house. In light of this Court's decisions, an outbuilding may be regarded as an adjunct to the domestic economy of the family only if it is in some way associated with the intimate activities of family life. Although a barn certainly is a typical feature of a farm or ranch, its purpose is to aid in farming, not to extend the area within which family life is carried on.[12] Thus, a barn presumptively is not part of the curtilage. And absolutely no showing was made in this case that the barn in question was used for any intimate family purpose. To the contrary, the record shows that the barn was on a property that respondent and his wife were in the process of purchasing, and that they and their children lived elsewhere (4 R. 163). Respondent's wife testified that the property was not yet used as a ranch or farm (*id.* at 164) and that the barn was used for "nothing" (*id.* at 165). The one use of the barn that the record discloses—its use as a drug laboratory—can hardly be called an intimate family purpose.[13]

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[12] See *Walker* v. *United States*, 225 F.2d 447, 453 (Rives, J., dissenting) ("any attempt to equate a man's barn with his dwelling must lower the dignity of the latter").

[13] See *United States* v. *Eng*, 753 F.2d 683, 686 (8th Cir. 1985) (following *Oliver*, marijuana patch lies outside curtilage because, among other factors, there is "no indication of domestic use and enjoyment"); *State* v. *Lee*, 120 Or. 643, 649, 253 P. 533, 534-535 (1927) (barn used only as distillery lies outside curtilage because it had no "family or domestic purpose"); *Hoppe* v. *State*, 122 Tex. Crim. 440, 55 S.W.2d 1053 (1932) (same).

The remaining factor is distance. The barn in this case was located 60 yards from the house, and 50 yards from the exclusionary fence surrounding the house (Pet. App. 3a, 7a, 19a, 51a). Although the courts of appeals have applied the distance criterion unevenly, the clear trend of the decisions suggests that 50 to 60 yards is too far from the house to be considered curtilage.[14] Regardless of the decisions of the courts of appeals, we submit that an area removed from the house by half a football field is unlikely to be the setting for the intimate activities of family life. See *Hester*, 265 U.S. at 58 ("open field" in which officers were situated was 50-100 yards from house).

In sum, even under a balancing approach the decision of the court of appeals has nothing to recommend it. The barn in this case lay outside the curtilage, and the DEA agents therefore did not violate the Fourth Amendment by walking up to the barn and shining their flashlights on the drug laboratory in plain view inside it.

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[14] The Seventh Circuit canvassed the case law in 1976 and determined that, with the exception of the Fifth Circuit's *Walker* decision, all federal appellate decisions had found areas within 75 feet (25 yards) of the dwelling to be curtilage and areas beyond 75 feet not to be curtilage. *United States ex rel. Saiken* v. *Bensinger*, 546 F.2d 1292, 1296 (1976), cert. denied, 431 U.S. 930 (1977). The attempt in *Bensinger* to set a per se 75-foot rule, however, has not been well received. See *United States* v. *Swart*, 679 F.2d 698, 702 (7th Cir. 1982) (rejecting "an absolute rule that anything beyond a specific distance from a dwelling or business is in an area unprotected by the Fourth Amendment"); *United States* v. *Van Dyke*, 643 F.2d 992, 994 (4th Cir. 1981) (rejecting *Bensinger*). For an earlier and quainter distance rule, see 1 M. Hale, *Pleas of the Crown* *559 ("a bow-shot off from the house"). For a suggestion of a more complex, and rebuttable, distance rule, see Comment, *supra* note 5, 46 U. Pitt. L. Rev. at 816-818.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 85-998

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, *Petitioner,*

v.

RONALD DALE DUNN *Respondent.*

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Where a barn is located in a clearing surrounded by woods on a 198-acre ranch circled by a perimeter fence; ranch house and buildings are located at the end of a private drive approximately one-half mile from public road; entrance to private road secured by locked chain; barn was not visible from the public road or perimeter fence; contents of barn could not be seen from air or ground unless barn approached by one penetrating encircling fence, walked under its overhang, stood next to fishnet front covering; and entry could be made only by force or hurdling wooden gates which were locked; is this intrusion by officers a violation of the rights guaranteed by the Fourth Amendment?

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OPINIONS BELOW

The original opinion of the court of appeals, dated May 7, 1982 (Pet. App. 16a-35a), is reported at 674 F.2d 1093. The opinion of this court of appeals on remand from this Court, dated July 16, 1985 (Pet. App. 1a-11a), is reported at 766 F.2d 880. The opinions dissenting from denial of rehearing en banc of the 1985 opinion (Pet. App. 39a-47a) are unreported. The order of January 17, 1986, vacating the 1985 opinion (Pet. App. 48a) is unreported. The opinion of February 4, 1986, reinstating the 1982 opinion of the court of appeals (Pet. App. 49a-51a), is reported at 782 F.2d 1226.

JURISDICTION

The judgment of the court of appeals on remand from this Court (Pet. App. 52a) was entered on September 26, 1985. The petition for a writ of certiorari was filed on December 10, 1985. The new judgment of the court of appeals following the order vacating the 1985 opinion (Pet. App. 52a) was entered on February 4, 1986, and the supplement to petition for a writ of certiorari was filed on April 7, 1986. The petition for a writ of certiorari was granted on June 23, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

THE FIRST INTRUSION—NOVEMBER 5, 1980

On November 5, 1980, agents of the Drug Enforcement Administration with officers of the City of Houston, Texas Narcotics Division, were following a vehicle carrying a container of phenylacetic acid in which a "beeper" had been placed. R-IV 23, 31-35, 71. This vehicle was followed by these officers to a ranch site outside of Johnson City, Texas in Blanco County, Texas.

Around 10 o'clock or so in the evening of September 5, 1980, Special Agent Gaspodarik of D.E.A. and Officer Martin Fite of the City of Houston Police Department trespassed upon the ranch owned by Ronald Dale Dunn and conducted a visual and systematic search of the barn, garage, house and carport areas of the ranch. R-IV 80-82.

Having completed their unauthorized search of the ranch buildings and observation of their contents they crossed to the garage, the barns and the carport. They attempted to open the garage, but it was locked. R-IV 83.

Not discouraged, the policeman and the D.E.A. agent continued their trespass by walking around the side of the house. There an officer claimed he detected a "strong odor" of what he believed to be phenylacetic acid emanating from the barn. R-IV 76. They made no effort to obtain a warrant on November 5, 1980.

THE SECOND INTRUSTION—NOVEMBER 6, 1980

Convinced by the knowledge gained from their intrustion upon the ranch on November 5, 1980, that further trespass would be possible, the officers again intruded upon Mr. Dunn's ranch in the early afternoon. R-IV 85. Their route of trespass was basically the same route as that taken on November 5, 1980. This time D.E.A. Agent Fred Thomas accompanied Agent Gaspodarek who led Agent Thomas directly to the barn to view in daylight what he had seen by flashlight. R-IV 89. Again no warrant was sought or obtained. R-IV 116.

THE THIRD INTRUSION

THE EVENING OF NOVEMBER 6, 1980

Still not satisfied by their unauthorized intrusion on the two previous occasions, the agents and officers again tres-

passed on the evening of November 6, 1980, at about 7 p.m. Brazenly they went right up the driveway to see if any cars were in the carport. R-IV 91. The agent said he was anywhere from 100 to 50 yards to the home. R-IV 92. This trespass was committed by three other agents of D.E.A. along with Agent Gaspodarek. R-IV 103. They again searched and continued their vigil of Mr. Dunn's ranch on his ranch.

THE FOURTH INTRUSION—NOVEMBER 7, 1980

Not satisfied with what they had seen, the Agents enlisted the aid of the D.E.A. chemist to verify their observations. So, on the night of the 7th of November, 1980, Officer Fite and D.E.A. Chemist Goldston violated the privacy of Mr. Dunn's ranch and trespassed to the "laboratory." R-IV 151-152. Officer Fite did not know if a warrant was in existence or not.

SUMMARY OF THE ARGUMENT

Without a barn there is no farm. A barn is an integral part of a farm home. It houses animals, machinery, tools, and supplies for the farm.

Without question, the barn is closely associated with the home and the activities of family life. The barn in this case is within the general fence which is the fence guarding the expectation of privacy of the landowner and is within the curtilage of the home.

The Fourth Amendment values expressed in this Court's decisions reveal that curtilage is a vibrant concept, never stagnant, always adapting to the situations of land ownership today and tomorrow.

The location of house, barn and interior fences on a Texas farm demonstrate curtilage applies to the buildings

within that enclave. The Fourth Amendment therefore protects the home, the individuals' rights to be free from physical trespass and search of the barn.

RIGHT OF PRIVACY

The barn is an integral part of the farm. There is a right of privacy in the barn just as there would be in any commercial building. This right of privacy is the very essence of constitutional liberty and is as important as any other constitutional guarantee to any citizen. The location of the barn in an area not subject to public view or public access in a fenced area of 198 acres with a locked entrance call for the protection of the Fourth Amendment.

POLICY

The physical trespasses on the respondent's land and the unlawful search of his barn on three occasions were each violations of Texas state aw which provides penalties for trespassers and by statute gives a right of privacy. Texas state law also gives a right to use force to protect property from trespass. This creates a volatile situation in a state where folks are very protective of their property rights, and where they possess firearms and are subject to using them.

Violations of these state laws could lead to tragic results. This Court should recognize Texas laws, give full faith and credit to them, and insist that federal officers abide by state laws in this area.

Affirmation of this case on a ground of Comity would result in maintaining and furthering respect for the law.

ARGUMENT

Respondent's Barn Was Within The "Curtilage" Surrounding His Home

A farm is not a farm without a barn. A barn is an integral part of a farm home. Hay or feed, animals, machines, as well as other equipment, are kept in barns. The barn is always built some distance from the farm home for various reasons, including small varmints, flammable materials, and odors. The barn in this case was immediately surrounding and associated with the home.

The site plat attached to the Fifth Circuit opinion of February 4, 1986, (App. I) shows explicitly the fact that the path from the house to the barn and the driveway to the barn were both well-worn and used. The driveway leading from the road to the carport, one-half mile distant from the public road, continued to the barn at the rear of the house. The entire 198-acre tract was under a wire fence, which was the common fence referred to by Blackstone in his commentaries. The use of wire in Texas began in the 1880's. It's use changed the look of farm houses. Fences were put around the house to allow the housewife to have a yard filled with flowers protected from foraging cattle and horses. Other fences protected vegetable crops from these same animals. The fence at the public road was the fence keeping the public out of the farm. The fence around the house was there to protect the yard and garden from farm animals, and not to keep the public out, as the general fence served that function. As in *Walker* v. *United States*, 225 F.2d 447 (Fifth Circuit, 1955):

> Barn was part of owner's curtilage, and was within protection against unreasonable searches and seizures, though it was 70 to 80 yards from house and separated from house by private driveway and was

> surrounded by fence in which was a gap allowing entrance into barnyard from driveway in front of house.

The gate at the entrance to the Dunn property was secured by a locked chain. With that description of the usual farm in Texas, Appellee Dunn states the barn in this case was within and a part of the curtilage of the house.

> . . . curtilage is 'an area of domestic use immediately surrounding a dwelling and usually but not always fenced in with the dwelling.' *United States* v. *LaBerge*, 267 F. Supp. 686 (Md 1967).

Certainly the concept of curtilage must be an expanding one from its beginning with rock fences to the wire fences of today. It cannot remain stagnant as though the fences in Texas today are exactly like the fences of England in Blackstone's time.

Therefore, with the barn within the curtilage of the Dunn house, the agents of the government physically trespassed on Appellee Dunn's property in order to *seek* probable cause (App 33), and violated Appellee Dunn's Fourth Amendment rights by physically intruding without justification. These agents of the government had aerial photographs of Dunn's property in their possession early in the afternoon on November 5, 1980. They had ample time during daylight hours to study every detail in the photographs relating to the Dunn property. Yet, they chose to wait for the cover of darkness and proceed like thieves in the night to accomplish a mission supposedly designed to enforce the laws.

Their nighttime trek took them through the general fence surrounding Dunn's property where they physically trespassed upon the curtilage by walking under the tin overhang of the pole barn. With the aid of their flashlights

they looked through the barn's opening and inventoried the contents. Apparently not satisfied with their first trespass upon Dunn's property, government agents committed two additional physical trespasses, one in broad daylight.

Each time these agents entered Dunn's property they penetrated the curtilage and violated Dunn's Fourth Amendment right to be free from these unlawful trespasses and illegal searches.

By no means did any of these agents have the right to be in Dunn's barn under the overhang. This barn was behind the house and no member of the public had access to any part of these buildings save by invitation. None of the agents, government and state had any such invitation.

To say this barn was not a part of the curtilage is to give agents license to trespass upon private property and will lead to the oppressive practices condemned by James Otis in Paxton's Case, 1761, when the British government allowed general searches of the colonists by warrants called Writs of Assistance.

A holding by this Court in favor of the government would in effect be the issuance of the same type warrant which lead to the adoption of the Fourth Amendment.

The dissenting words of Judge Brandeis in *Olmstead* v. *United States*, 277 U.S. 478, 48 S.Ct. 572, 72 L.Ed.2d 954, (1928), are very appropriate to this case in placing Dunn's property within the context of the Fourth Amendment:

> They conferred as against the Government the right to be left alone—the most comprehensive of rights and the right most valued by civilized men. To protect the right, every unjustifiable intrusion by the Government upon the privacy of the individual,

whatever the means employed must be deemed a violation of the Fourth Amendment.

The government seeks to have this Court limit the curtilage to the nearest fence. It gives no reason or explanation for so doing. Then in its whipsawing action the government wants this Court to reject the curtilage concept if there is but one fence around the property and the area is large (the government's subjective description.) As the Court knows, what seems large in another state is but a normal distance in Texas.

Society expects its landowners to be protected in their ownership of property, not only from criminals, but from the police.

Without question the barn in this case was a part of the curtilage, and the warrantless entries on November 5th. and 6th., 1980, constituted Fourth Amendment violations. The government sought probable cause for a search warrant by trespassing on three occasions. It cannot say it had probable cause to search because the agent in charge admitted his intent in going on the Dunn property was to *seek* probable cause. (App. 33.)

The government fails to note that the agents searched the carport, the garage and the storage areas outside the fence surrounding the house, but conntected to the fence around the house. Even the government would not urge that the garage, carport and storage areas were not within the curtilage.

This case should be affirmed on the violations of Dunn's Fourth Amendment rights.

RIGHT OF PRIVACY

Assuming the Court finds the barn is not a part of the curtilage, the next consideration is its status. Dunn

exhibited a subjective expectation of privacy in the barn and its contents. The steps he took were open and obviously designed to tell the public his land was not open to it. The farm was surrounded by a general fence, and the private driveway was secured by a locked chain.

The barn, as an essential part of Dunn's business, enjoyed the same Fourth Amendment protection as do other businesses. *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978), and *Oliver* v. *United States*, U.S. 80 L.Ed.2d 214.

Dunn had property rights by virtue of his ownership of the land where the barn was located. As this Court stated in *Rakas* v. *Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 389 (1978).

> . . . property rights reflect society's explicity recognition of a person's authority to act as he wishes in certain areas, and therefore should be considered in determining whether an individual's expectation of privacy are reasonable. 439 U.S. at 153, 99 S.Ct. at 435 (Powell, J. Concurring).

". . . an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home." U.S. 80 L.Ed.2d at 224 104 S.Ct. Dunn had a right to privacy in the barn guaranteed to him by the Fourth Amendment. Neither *Oliver, supra*, nor *California* v. *Ciraolo*, 476 U.S. 90 L.Ed.2d 210, 106 S.Ct. include an open field to include a structure such as the barn in this case.

The definition of open fields in *Oliver, supra*, includes any unoccupied or undeveloped area which could also encompass a thickly wooded area. That is not involved in this case. We have a culturally distinct unit accepted by society as one deserving Fourth Amendment protection.

Is Mr. Dunn or any other farmer to stand idly by while agents of the government search his barn without a warrant issued by a magistrate?

The actions of the agents of the government violated the basic constitutional rule that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are intrinsically unreasonable under the Fourth Amendment--subject only to a few specifically established and well delineated exceptions.'" *Coolidge* v. *New Hampshire*, 403 U.S. 443, 454-55, 91 S.Ct. 2022, 2032, 29 L.Ed.2d 564, 576, 1971. There are no exceptions in this case.

". . . an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home." *Oliver* v. *United States*,—U.S.—80 L.Ed.2d at 224, 104 S.Ct.— Dunn had a right to privacy in the barn guaranteed to him by the Fourth Amendment. Neither *Oliver, supra*, nor *California* v. *Ciraolo*, 476 U.S. 90 L.Ed.2d 210, 106 Ct.— include an open field to include a structure such as the barn in this case.

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Fourth Amendment—subject only to a few specifically established and well delineated exceptions.'" *Coolidge* v. *New Hampshire*, 403 U.S. 443, 454-55, 91 S.Ct. 2022, 2032, 29 L.Ed.2d 564, 576, 1971. There are no exceptions in this case.

POLICY

Under Texas law a landowner who has taken the steps Dunn took is given a right of privacy by statute. § 30.05 Criminal Trespass, Penal Code of Texas:

> (a) person commits an offense if he enters or remains on property or in a building of another without effective consent and he:
>
> (1) had notice that the entry was forbidden; or (2) received notice to depart but failed to do so.
>
> (b) For purposes of this section:
>
> (1) "entry" means the intrustion of the entire body; and (2) "notice" means:
>
> (A) oral or written communication by the owner or someone with apparent authority to act for the owner;
>
> (B) fencing or other enclosure obviously designed to exclude intruders or to contain livestock; or
>
> (C) a sign or signs posted on the property or at the entrance to the building, reasonably likely to come to the attention of intruders, indicating that entry is forbidden.
>
> (c) An offense under this section is a Class B misdemeanor unless it is committed in a habitation or the actor carries a deadly weapon on or about his person during the commission of the offense, in which event it is a Class A misdemeanor.

Texas law further authorizes one in possession of land to protect his property by the use of force. § 9.41, Penal Code of Texas:

> (a) A person in lawful possession of land or tangible, moveable property is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to prevent or terminate the other's trespass on the land or unlawful interference with the property.

Under the facts of this case had Dunn been home when the agents searched his barn at night, Texas law gave Dunn the right to use force to protect his property from trespassers. Had this occurred there is no doubt Dunn would have been charged in federal court with assaulting a federal officer under 18 U.S.C. 1101.

Dunn submits that in the interest of Comity, this Court recognize that federal agents or any law enforcement agency obey the laws of the state in a situation such as this. By affirming this case on policy grounds of Comity this Court would affirm the basic principle of law that everyone is supposed to obey the law, and no person is above the law. This would require the agents of the government to know and obey the laws of the state as well as federal law.

In this case there can be no argument for lack of knowledge, for one of the officers involved in the initial trespass was an officer for the City of Houston, Texas. This officer is required to know and enforce the laws of Texas.

In *Oliver, supra*, the Court in note 15 speaks about trespass under the common law and says it is not to be applied to public officers. Under Texas statutes quoted above, there is no exception for public officers.

All who violate the mandate of Sec. 30.05 are guilty of criminal trespas. In the case of *United States* v. *Hylton*, 710 F.2d 1106, 1109 (Fifth Circuit, 1983) the Court concluded there was a violation of Texas criminal statute by I.R.S. agents.

A policy set forth by this Court directing law enforcement agencies of the government to obey the laws of the state where the land is located can only preserve the constitutional rights of all persons.

> A rule preventing the government from exploiting its own wrongdoing is intended to serve the policy of maintaining respect for law. The primary way in which such a rule furthers this policy is by deterring government officials from illegal acts. 'Our Government is the potent, the omnipresent teacher . . . If the Government becomes a lawbreaker, it breeds contempt for law . . .' *Olmstead* v. *United States*, 277 U.S. 485 (1928) (Brandeis, J., dissenting.)

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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No. 85-998

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

v.

RONALD DALE DUNN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

In our opening brief, we showed that a narrow interpretation of "curtilage" would best comport with the common law roots of that concept and this Court's decisions. We also suggested that, in order to make the concept concrete and easily understood, this Court should adopt a bright-line rule that the curtilage extends no farther than the nearest fence surrounding a house. Finally, we argued that the decision of the court of appeals could not stand even if the Court chose to apply a balancing test rather than a bright-line rule. Respondent has not seriously challenged the bulk of our analysis. The points that he does make lack merit.

1. Respondent places much emphasis on his contention that the actions of the law enforcement officers in this case constituted a trespass under Texas law (Resp. Br. 2-3, 4, 6, 7, 11-13). Respondent appears to be arguing that a trespass, without more, is a Fourth Amendment violation. That argument, however, was squarely rejected in *Hester* v.

United States, 265 U.S. 57, 58 (1924), and *Oliver* v. *United States*, 466 U.S. 170, 183-184 (1984).[1] For the reasons stated in our opening brief, the officers' actions in peering into respondent's barn did not violate the Fourth Amendment. That is true whether or not the officers violated the Texas law of trespass.

It is nonetheless of some interest to note that, contrary to respondent's assertion, Texas law appears to recognize the performance of law enforcement duties as a justification for what would otherwise be a trespass. In cases coming from Texas, the Fifth Circuit has applied the general rule that, "[w]hen the performance of his duty requires an officer of the law to enter upon private property, his conduct, otherwise a trespass, is justifiable." *Giacona* v. *United States*, 257 F.2d 450, 456, cert. denied, 358 U.S. 873 (1958); accord *United States* v. *Knight*, 451 F.2d 275, 278 (5th Cir. 1971), cert. denied, 405 U.S. 965 (1972). No reported decision from any Texas court or any federal court applying Texas law is to the contrary.[2]

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[1]Respondent bases his argument in part on the dangers posed by landowners who might use force to repel what they perceived as a trespass by law enforcement officers (Resp. Br. 12). The Court in *Oliver*, however, firmly rejected a rule that would treat all trespasses as Fourth Amendment violations, even though the dissent pointed to the dangers that might be posed by "irate landowners" using "self-help" (466 U.S. at 195 n.19).

[2]Respondent incorrectly states (Resp. Br. 13) that the court found a violation of Texas trespass law by agents of the Internal Revenue Service in *United States* v. *Hylton*, 710 F.2d 1106 (5th Cir. 1983). In fact, the court in that case merely held that, in light of the First Amendment right to petition the government for redress of grievances, a property owner was not criminally liable for filing criminal trespass complaints against IRS agents who had entered her property on law enforcement business. The court acknowledged "the fact that the agents may have a valid defense" to the trespass charges but left evaluation of the defense to the state courts in the trespass proceeding (710 F.2d at 1111 n.7).

2. As we suggested in our opening brief (Gov't Br. 13), and as respondent confirms, a barn is a repository of hay or feed, animals, machines, and other equipment, built some distance from the house because of the noxious effects of "small varmints, flammable materials, and odors" (Resp. Br. 5). There is no tenable basis to assert that a building of that character is an area involving "intimate activities associated with family privacy" (*Dow Chemical Co.* v. *United States,* No. 84-1259 (May 19, 1986), slip op. 9) or "the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life' " (*Oliver*, 466 U.S. at 180).

Respondent, however, claims Fourth Amendment protection on a different basis: that the barn was "an essential part of [his] business" (Resp. Br. 9). It is, perhaps, a nice constitutional question whether a barn on a farm or ranch but outside the curtilage of the home is entitled to the same constitutional protection as a commercial building where one might more readily expect to find "private" matters.[3] That question, however, does not have to be resolved in this case.

Even assuming the barn in this case was entitled to the same Fourth Amendment protection as an office or factory, the actions of the law enforcement officers still did not violate the Fourth Amendment. The law enforcement agents peered into the open side of the barn from outside;

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[3]See *Norman* v. *State*, 379 So. 2d 643, 647 (Fla. 1980) (barn protected as part of the farmer's business); *State* v. *Vicars*, 207 Neb. 325, 329-330, 299 N.W.2d 421, 425 (1980) (shed held to be within curtilage because it was used in family farming operation). Even assuming that these cases were correctly decided, they provide no comfort to respondent, who was not in fact carrying on the business of farming or any other legitimate business on his ranch or in his barn; the barn was used exclusively as a drug laboratory (see Gov't Br. 21).

they did not enter the barn.[4] This Court has made it clear that "observation * * * *without* physical entry" of a business facility is permissible (*Dow*, slip op. 9). A government official making visual observation of commercial buildings from outside those buildings "may operate within or without the [business] premises but in either case he is well within the 'open fields' exception to the Fourth Amendment." *Air Pollution Variance Board* v. *Western Alfalfa Corp.*, 416 U.S. 861, 865 (1974).[5] Naked-eye observations and other uses of the senses from outside a structure are permitted as long as the observer is not within the curtilage. See, *e.g.*, *United States* v. *Williams*, 581 F.2d 451, 454 (5th Cir. 1978), cert. denied, 440 U.S. 972 (1979); *United States* v. *Brown*, 487 F.2d 208, 209-210 (4th Cir. 1973), cert. denied, 416 U.S. 909 (1974); *Fullbright* v. *United States*, 392 F.2d 432, 434 (10th Cir.) ("observations from outside the curtilage of activities within are not generally interdicted by the

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[4]The officers, looking into the barn at night, used flashlights. The use of flashlights did not convert their naked-eye observations into an illegal search. *Texas* v. *Brown*, 460 U.S. 730, 739-740 (1983) (plurality opinion); *United States* v. *Lee*, 274 U.S. 559, 563 (1927); *United States* v. *Hernandez*, 715 F.2d 548 (11th Cir. 1983), cert. denied, 465 U.S. 1009 (1984).

[5]In *Dow*, the Court noted that the chemical company had not taken precautions against aerial observation (slip op. 9-10 n.4), and that the observation was undertaken from the public airspace (*id.* at 12). Similarly, in *Western Alfalfa Corp.*, the Court noted that "[t]he field inspector was on respondent's property but we are not advised that he was on premises from which the public was excluded" (416 U.S. at 865). As the language from *Western Alfalfa Corp.* quoted in text suggests, however, the decisions cannot be limited to the situation in which the visual observation of a business facility is undertaken from a place from which the public has not been excluded. The Fourth Amendment does not protect the area surrounding a house just because the homeowner has taken steps to exclude the public (*Oliver*, 466 U.S. at 182 & n.13). The Fourth Amendment therefore cannot protect the area surrounding a business facility, in which an expectation of privacy exists but is significantly less than that in the home (*Dow*, slip op. 10), just because the business owner has taken steps to exclude the public.

Constitution"), cert. denied, 393 U.S. 830 (1968); *United States* v. *Sims*, 202 F. Supp. 65, 66 (E.D. Tenn. 1962); cf. Gov't Br. 9 n.3 (citing cases in which observation into the home itself was upheld). Since "the intimate activities associated with family privacy and the home and its curtilage simply do not reach the outdoor areas or spaces between structures and buildings" of a business facility (*Dow*, slip op. 9), the business structure has no curtilage, and the Fourth Amendment does not prohibit naked-eye observations from the ground surrounding the structure.

3. Respondent argues for a Texas-specific curtilage rule, noting that "what seems large in another state is but a normal distance in Texas" (Resp. Br. 8). Respondent takes issue with our suggestion that the curtilage should extend no farther than the fenced-in area around a house, if there is a fence, but should not extend to the entire fenced-in area around a house if that area is large (*ibid.*). The courts of Texas itself, however, have described the curtilage as " 'a fence or inclosure of a small piece of land around a dwelling house.' " *Cantu* v. *State*, 557 S.W.2d 107, 109 (Tex. Crim. App. 1977) (quoting *Worth* v. *State*, 111 Tex. Crim. 288, 290, 12 S.W.2d 582, 584 (1928)). And, as we noted in our opening brief (Gov't Br. 22), the barn in this case was half a football field away from the house. We submit that such a distance, even in Texas, is larger than the area reserved for intimate activities associated with family privacy.

For the reasons stated above and in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

JANUARY 1987